No. 02-1672
Title: Roderick Jackson, Petitioner
v.
Birmingham Board of Education
Docketed: May 15, 2003
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (02-11303)
Decision Date: October 21, 2002
Rehearing Denied: January 13, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 28 2003	Application (02A829) to extend the time to file a petition for a writ of certiorari from April 13, 2003 to June 12, 2003, submitted to Justice Kennedy.
Mar 31 2003	Application (02A829) granted by Justice Kennedy extending the time to file until May 13, 2003.
May 13 2003	Petition for writ of certiorari filed. (Response due June 16, 2003)
Jun 13 2003	Order extending time to file response to petition to and including July 16, 2003.
Jul 15 2003	Brief of respondent Birmingham Board of Education in opposition filed.
Jul 25 2003	Reply of petitioner Roderick Jackson filed.
Jul 30 2003	DISTRIBUTED for Conference of September 29, 2003.
Oct 6 2003	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 11 2004	Brief amicus curiae of United States filed.
May 25 2004	DISTRIBUTED for Conference of June 10, 2004.
Jun 14 2004	Petition GRANTED.
Jul 8 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 19, 2004.
Jul 19 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jul 27 2004	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent
Aug 18 2004	Brief amicus curiae of American Bar Association filed.
Aug 19 2004	Joint appendix filed.
Aug 19 2004	Brief of petitioner Roderick Jackson filed.
Aug 19 2004	Brief amicus curiae of United States filed.
Aug 19 2004	Brief amicus curiae of College Sports Council filed.
Aug 19 2004	Brief amicus curiae of Leadership Conference on Civil Rights filed.
Aug 19 2004	Brief amicus curiae of Birch Bayh filed.
Aug 19 2004	Brief amici curiae of New York Lawyers for the Public Interest. et al. filed.
Aug 19 2004	Brief amici curiae of National Education Association, et al. filed.
Aug 19 2004	Brief amici curiae of Women's Sports Foundation, et al. filed.
Aug 19 2004	Brief amici curiae of National Partnership for Women & Families, et al. filed.
Aug 30 2004	Extension of time within which to file respondent's brief on the merits to and including

	October 7, 2004.
Sep 29 2004	SET FOR ARGUMENT ON Tuesday, November 30, 2004.
Oct 1 2004	CIRCULATED.
Oct 7 2004	Brief amicus curiae of Pacific Legal Foundation filed. (Distributed)
Oct 7 2004	Brief amici curiae of National School Boards Association, et al. filed. (Distributed)
Oct 7 2004	Brief amicus curiae of National Wrestling Coaches Association filed. (Distributed)
Oct 7 2004	Brief amicus curiae of Eagle Forum Education & Legal Defense filed. (Distributed)
Oct 7 2004	Brief amici curiae of Alabama, et al. filed. (Distributed)
Oct 7 2004	Brief of respondent Birmingham Board of Education filed. (Distributed)
Oct 7 2004	Motion of Alabama, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Oct 14 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 26 2004	Letter dated October 26, 2004 received from counsel for the respondent. (Distributed).
Nov 1 2004	Motion of Alabama, et al. for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. The time is divided as follows: 20 minutes to the respondent and 10 minutes to Alabama, et al.
Nov 1 2004	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Nov 2 2004	Record received from U.S.C.A. 11th Circuit. (1 envelope)
Nov 12 2004	Reply of petitioner Roderick Jackson filed. (Distributed)
Nov 15 2004	Record received from U.S.D.C. N. Dist. of Alabama. (1 folder)
Nov 30 2004	Argued. For petitioner: Walter Dellinger, Washington, D.C.; and on behalf of the United States, as amicus curiae, Irving L. Gornstein, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Kenneth L. Thomas, Birmingham, Ala; and Kevin C. Newson, Solicitor General, Montgomery, Ala. (for Alabama, as amicus curiae.)

Supreme Court, U.S.
FILED

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No. 02-

IN THE
Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

PARTIES TO THE PROCEEDING

Petitioner is Roderick Jackson, who was plaintiff in the district court and appellant in the court of appeals. Respondent is the Birmingham Board of Education, defendant in the district court and appellee in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Roderick Jackson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 309 F.3d 1333 (11th Cir. 2002) and reprinted in the Appendix (App.") at 1a. The memorandum opinion and order of the district court are not reported. App. 27a.

JURISDICTION

The court of appeals' decision was filed on October 21, 2002. The petition for rehearing and rehearing en banc was denied on January 13, 2003. App. 34a-35a. An application for an extension of time in which to file this petition was granted by Justice Kennedy on March 31, 2003, extending the time in which to file this petition to May 13, 2003. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(1)-(4). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1681(a) of Title 20, United States Code, provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

This petition presents a question that squarely divides the federal courts of appeals and is critical to effective enforcement of Title IX of the Education Amendments of 1972: whether individuals who protest Title IX violations and are then subject to reprisal discrimination may sue to redress

such retaliatory conduct.

This is *not* a case about the existence of a private right of action under Title IX. That issue is settled already: violations of Title IX do give rise to private rights of action, despite the fact that no private remedy is expressly articulated in the statute. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979). That private right of action, the Court has held, is necessary to afford individual citizens "effective protection" against practices made unlawful by Title IX. *Id.* at 704; *see also id.* at 705-06.

The only question in this case is whether retaliatory conduct falls into the category of practices prohibited by Title IX and is thus subject to private suit. On that question, the Eleventh Circuit stands alone. The holding below – that Title IX does not prohibit retaliation – is in conflict with that of every other federal court of appeals to reach the issue. It also conflicts with precedent of this Court construing similarly broad anti-discrimination statutes, and with the position of the agencies primarily responsible for enforcement of Title IX. Indeed, the United States has intervened before the Fourth Circuit as *amicus curiae* in support of a private right of action for the victims of reprisal discrimination under Title IX. *See* Brief for the United States as *Amicus Curiae* Supporting Plaintiff and Urging Reversal, *Litman v. George Mason Univ.*, No. 01-2128 ("U.S. *Litman* Brief").

Because the decision below creates a direct conflict among the federal circuits and threatens to undermine a fundamental protection against sex discrimination in all federally funded educational settings, this Court should grant certiorari review.

A. Background

1. Section 901 of Title IX provides that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a federally funded

education program or activity "on the basis of sex." 20 U.S.C. § 1681(a). The Court has held that this general prohibition is to be construed broadly, *see North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), and protects individuals against conduct not specified in the statutory language, including employment discrimination based on gender, *id.*, and student-on-student sexual harassment, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). The Court also has construed Title IX to allow for money damages in a private cause of action, though the statute does not expressly provide for such damages. *Franklin v. Gwinnett County Pub. Sch. Sys.*, 503 U.S. 60 (1992).

Section 902 of Title IX authorizes all federal agencies that fund educational activities to issue regulations implementing the substantive provisions of the statute. 20 U.S.C. § 1682. Under that authority, the Department of Education has made it clear that no recipient of federal funds may "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section [901] of the Act . . . because he has made a complaint." 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7(e)). That regulation, along with others promulgated under Title IX, became effective only after Congress considered and declined to disapprove it.

2. In 1993, petitioner Jackson was hired by the Birmingham Board of Education ("Board") as a physical education teacher and girls' basketball coach. He was later transferred to Ensley High School, where his duties again included coaching the girls' basketball team. When petitioner discovered that the girls' team was denied equal funding and equal access to athletic equipment and facilities, he protested the unequal treatment to his supervisors. Shortly after, petitioner began receiving negative work evaluations, and in May 2001, he was relieved of his paid coaching duties. Petitioner remained employed as a physical education teacher. App.

3a.

B. District Court Proceedings

In July 2001, petitioner filed suit against the Board in the Northern District of Alabama, alleging, *inter alia*, that he was retaliated against in violation of Title IX due to his complaints about the discriminatory treatment of the girls' basketball team. The Board moved to dismiss petitioner's complaint on the ground that Title IX does not provide a cause of action for retaliation.

The case was referred to a magistrate judge. The magistrate concluded that there was a "persuasive" case for recognizing retaliation claims under Title IX, relying on the Fifth Circuit's decision in *Lowrey v. Texas A & M University System*, 117 F.3d 242 (5th Cir. 1997). But he believed that he was bound to dismiss the complaint by a prior decision of the same district court, summarily affirmed without published opinion, rejecting a claim of retaliation under Title IX. *See Holt v. Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995), *aff'd*, 109 F.3d 771 (11th Cir. 1997) (Table No. 96-6046), *cert. denied*, 522 U.S. 817 (1997). App. 31a-32a.

The district court adopted the report and recommendation of the magistrate judge. Like the magistrate, the court relied exclusively on *Holt* and concluded that absent any "controlling Eleventh Circuit or Supreme Court authority holding that Title IX expressly or implicitly creates a private cause of action for retaliation," petitioner's complaint must be dismissed. App. 27a.

C. Court of Appeals Proceedings

Petitioner appealed the dismissal of his complaint to the Eleventh Circuit. The court of appeals "assume[d] for purposes of this appeal that the Board retaliated against Jackson for complaining about perceived Title IX violations." App. 3a. Accordingly, the only question before the court was

whether Title IX provides petitioner with a private right of action against the Board for allegedly retaliatory conduct. *Id.* In acknowledged conflict with the Fifth Circuit's decision in *Lowrey*, *id.* at 25a n.15, the court answered that question in the negative.

The court began by announcing that its analysis would be "governed in substantial measure" by *Alexander v. Sandoval*, 532 U.S. 275 (2001). App. 8a. At issue in *Sandoval* was whether a regulation prohibiting practices with a "disparate impact" on protected classes, promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, gives rise to a private right of action for disparate impact violations. This Court concluded that because Title VI itself was not intended to reach practices with a disparate impact, no private right of action to challenge disparate impact discrimination exists. App. 10a-12a; *Sandoval*, 532 U.S. at 285-86. In concluding that this case is controlled by *Sandoval*, the court below relied heavily on the fact that petitioner's claim implicates a regulation – the Department of Education's anti-retaliation regulation, 34 C.F.R. 106.71 – as well as Title IX itself. App. 9a.

After lengthy discussion of *Sandoval* and the availability of a private claim for disparate impact under Title VI, the court turned to the question presented by this case: whether claims for retaliation are cognizable under Title IX. Under *Sandoval*, the court reasoned, that question must be answered by reference to legislative intent. App. 11a-12a. The court found no evidence that Congress intended to prohibit retaliatory conduct under Title IX. Beginning with the text of § 901, it reasoned that the "absence of any mention of retaliation . . . weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct." App. 20a. And § 902, the court found, concerned with administrative enforcement and not substantive rights, sheds no light at all on "what harm Title IX is meant to remedy." *Id.* at 21a.

In short, "review of §§ 901 and 902 unearths absolutely no indication that Congress intended Title IX to prevent or redress retaliation." *Id.* at 22a. There can be no private cause of action, the court concluded, for conduct that is not prohibited by the statute. *Id.* Though that conclusion was enough to dispose of the case, the court went on to suggest that "even if Title IX did aim to prevent and remedy retaliation," it would not extend to persons who were not themselves victims of gender discrimination. "[T]here is quite simply no indication of any kind that Congress meant to extend Title IX's coverage to individuals other than direct victims of gender discrimination." *Id.* at 23a-24a.

As noted above, the court acknowledged that its decision was in conflict with Fifth Circuit precedent, *id.* at 25a n.15, and also inconsistent with a case from the Fourth Circuit recognizing a reprisal cause of action under Title IX, *id.* at 23a n.13. The court observed that both cases were decided before this Court's decision in *Sandoval*, and deemed the contrary authority "unpersuasive" in light of that decision. *Id.* at 25a n.15.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with decisions from every other federal court of appeals to consider the issue presented here. Every one of those courts has agreed that Title IX prohibits retaliation and that individuals therefore have a cause of action for reprisal discrimination.

The court of appeals seems to believe that this conflict is immaterial because it is based entirely on case law that predates *Sandoval*. That is wrong, for two separate reasons. First, court of appeals decisions recognizing a cause of action for retaliation have issued after as well as before *Sandoval*. Second, there is no reason to think that circuits would reverse course on Title IX in light of *Sandoval*. As the Fourth Circuit recently concluded in the analogous Title

VI context, *Sandoval* does not limit the availability of a private right of action for reprisal discrimination. *See Peters v. Jenney*, No. 01-2413, 2003 WL 1908728, at *7 (4th Cir. Apr. 22, 2003).

2. The decision below is also inconsistent with a long line of cases – from this Court as well as from the federal courts of appeals – recognizing that a prohibition on retaliation is necessarily implicit in an anti-discrimination mandate. This Court has found that fundamental civil rights statutes like 42 U.S.C. §§ 1982 and 1983, which do not have an express prohibition on reprisal discrimination, do protect against retaliation. It is now well-established that "[r]etaliation of this sort bears such a symbiotic and inseparable relationship" to intentional discrimination that it would be reasonable to "conclude that Congress meant to prohibit both, and to provide a remedy for victims of either." *Peters*, 2003 WL 1908728, at *8.

3. The case for application of that rule is particularly strong with respect to Title IX. Title IX's legislative history makes clear that Congress understood the importance of protecting against retaliation, and approved the implementing regulation that construes Title IX to prohibit such retaliation. Moreover, the Departments of Education and Justice have long taken the position that Title IX encompasses a prohibition on retaliation – agency positions entitled to deference that was not accorded by the court below.

The Court should grant review to resolve the conflict created by the decision below and to affirm what Congress, numerous other courts of appeals, and the federal agencies tasked with interpreting and enforcing Title IX have all recognized: reprisal discrimination is prohibited under Title IX, and individuals who are retaliated against for opposing unlawful sex discrimination have a private right of action to redress such violations.

I. THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS ABOUT WHETHER THERE IS A PRIVATE RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX.

A. The Decision Below Directly Conflicts With Decisions Of Several Other Courts Of Appeals.

1. In holding that petitioner does not have a private cause of action for retaliation under Title IX, the court below expressly and properly recognized that its decision was contrary to the Fifth Circuit's holding in *Lowrey*. App. 25a n.15.

Like this case, *Lowrey* involved a coach of a women's sports team who complained to her supervisors about inequalities in the treatment of male and female athletes. Like petitioner, the plaintiff in *Lowrey* alleged that she suffered retaliation – including removal from her job as Women's Athletic Coordinator – as a consequence of her protests. *Lowrey*, 117 F.3d at 244. In contrast to this case, the Fifth Circuit held that the plaintiff in *Lowrey* did have a cause of action for retaliation under Title IX. *Id.* at 249. Recognizing that the "prohibition against retaliation is intended to vindicate the antidiscrimination principle of title IX," *id.* at 248 n.6, the court held that a right of action for retaliation is essential to the goals of Title IX for two reasons: it encourages individuals to "expose violations" of the statute and "protect[s] such whistleblowers from retaliation," *id.* at 254.

The two cases are indistinguishable on their facts. But individuals in the Fifth Circuit may sue for retaliation under Title IX; those in the Eleventh Circuit may not. That conflict by itself warrants the Court's intervention.

2. In discussing (and dismissing) the Fifth Circuit's precedent, the court below suggested that *Lowrey* is the "lone circuit decision" contrary to its own holding. App. 25a n.15; *but see id.* at 23a n.13 (noting contrary Fourth Circuit authority). But several other circuits also have held that Title

IX gives rise to a cause of action for retaliation.[1]

Indeed, every circuit to consider the issue has concluded, contrary to the decision below, that Title IX prohibits reprisal discrimination and gives victims of retaliation a cause of action to redress the violation. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002) (establishing standard that must be met in order for student to prevail on Title IX retaliation claim); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995) (same); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (recognizing private right of action because "[r]etaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX"). Other courts of appeals have at least implicitly recognized that Title IX prohibits reprisal discrimination. *See Brine v. Univ. of Iowa*, 90 F.3d 271, 272-73 (8th Cir. 1996); *Willner v. Budig*, 848 F.2d 1032, 1033 (10th Cir. 1988).[2]

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[1] The court may have singled out *Lowrey* because that case, like this one, involved a claim by a coach who was not a so-called "direct victim of gender discrimination." App. 24a. But that factual point is of no help in distinguishing contrary precedent. First, the decision below discusses petitioner's "indirect" victim status only after holding that Title IX does not in any event provide a cause of action for retaliation, and that discussion is thus dicta. App. 23a; *see supra* p. 6. Second, there is no reason in precedent or logic for protecting only those who are the direct targets of the discrimination. On the contrary, as the Fourth Circuit recently observed, a long line of precedent beginning with this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (cause of action for retaliation under § 1982), provides those who protest discrimination against others with the same protection from retaliation as those who protest discrimination against themselves. *Peters*, 2003 WL 1908728, at *8; *see infra* pp. 13-14. Moreover, discrimination against women's teams is interconnected with discrimination against the teams' coaches.

[2] Despite the near-consensus in the federal circuit courts, there appears to be increasing confusion among lower courts, where the retaliation issue arises repeatedly and results in inconsistent decisions. *Compare Burwell v. Pekin Comm. High Sch. Dist. 303*, 213 F. Supp. 2d 917,

The conflict of authority created by the decision below is far broader than the court of appeals acknowledged. The federal circuit courts have for years recognized that Title IX allows for suits by victims of reprisal discrimination, and the decision below is in conflict with a substantial body of case law.

B. This Court's Decision In *Sandoval* Does Not Resolve The Conflict.

Contrary to the suggestion of the court below, this Court's decision in *Sandoval* does not explain away the conflict in the courts of appeals, and *Sandoval* does not render certiorari review unnecessary.

1. The conflict among the courts persists. Since *Sandoval* was decided, the First Circuit has held that Title IX does provide a cause of action for retaliation, *see Frazier*, 276 F.3d at 67, and the court below has held to the contrary. *Sandoval* has not resolved the issue in the circuit courts.

Sandoval – a case about disparate impact claims under Title VI – simply has no bearing on whether Title IX prohibits retaliation. What *Sandoval* holds is that there can be no implied cause of action for conduct that the Court has held is *permissible* under a statute, even when such a right might be implied by agency regulation. 532 U.S. at 291 ("language in a regulation [cannot] conjure up a private cause of action that has not been authorized by Congress"). Because Title VI does not itself prohibit disparate impact practices, the Court concluded that it is "clear that the private right of action to enforce [Title VI] does not include a private right to enforce [disparate impact] regulations." *Id.* at 285.

934-35 (C.D. Ill. 2002) (recognizing claim for retaliation under Title IX), *with Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 585-87 (2001) (no private right of action for retaliation available under Title IX), *appeal pending*, No. 01-2128. *See also, e.g., Atkinson v. Lafayette Coll.*, No. 01-CV-2141, 2002 WL 123449, at *8 (E.D. Pa. June 29, 2002) (acknowledging that "*Lowrey* is, admittedly, right on point" but declining to follow *Lowrey* in view of *Sandoval*).

At the same time, *Sandoval* confirms that when Congress "intends [a] statute to be enforced through a private cause of action [it] intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 284. The question presented by this case is whether Title IX itself – either by its own terms or through regulations that "authoritatively construe the statute," *id.* – prohibits retaliation. If it does, then the private right of action recognized in *Cannon* extends to actions for retaliation. The only issue here is whether Title IX does in fact prohibit retaliation, and on that issue, *Sandoval* says nothing at all.[3]

2. The limited scope of *Sandoval* is confirmed by the Fourth Circuit's recent decision in *Peters v. Jenney*, 2003 WL 1908728, recognizing a cause of action for retaliation under Title VI, as implemented by an anti-retaliation regulation identical to the Title IX regulation. *Sandoval*, the court reasons, applies only when a regulation prohibits conduct that the statute itself permits. The Title VI anti-retaliation regulation, on the other hand, is a valid interpretation of Title VI's "core antidiscrimination mandate," and hence enforceable under Title VI's long-established private cause of action. *Id.* at *6. In short, *Sandoval* does not limit the availability of a private right of action for conduct that is prohibited by statute and regulations that authoritatively construe the statute. *Id.* at *9.

[3] *Sandoval* is limited to the question of whether *Title VI* authorizes a cause of action for *disparate impact*. It does not address whether a cause of action for retaliation is available under Title VI, *see Peters v. Jenney*, No. 01-2413, 2003 WL 1908728. at *5, 13 (4th Cir. Apr. 22, 2003) (recognizing claim for retaliation under Title VI), let alone whether such an action is available under Title IX. Nor does *Sandoval* preclude a private right of action for disparate impact under Title IX.

That reasoning – which reflects a proper reading of *Sandoval* – cannot be squared with the view of the court below that *Sandoval* somehow settles the question of whether Title IX provides a cause of action for reprisal discrimination. Indeed, both the majority and the dissent in *Peters* acknowledged, implicitly or expressly, that the Fourth Circuit's reading of *Sandoval* is inconsistent with the approach taken by the Eleventh Circuit in the decision below. *See id.* at *8 n.10; *id.* at *14 (Widener, J., dissenting).

As *Peters* demonstrates, there is no reason to think that other courts will make the same mistake as the court below, and overrule their prior Title IX precedent in light of *Sandoval*. The conflict of authority in the federal courts of appeals will not be resolved without this Court's intervention.

II. PROTECTION FROM RETALIATION IS A CRITICAL ELEMENT OF TITLE IX'S ANTI-DISCRIMINATION MANDATE.

The decision below is inconsistent not only with decisions of other federal circuits, but also with this Court's own precedent. The Court has long recognized that protection from retaliation is an integral part of anti-discrimination laws, whether or not those laws expressly prohibit retaliation. That general rule applies with special force in the Title IX context, where the legislative history clearly shows that Congress intended Title IX to reach reprisal discrimination as well as other forms of discrimination.

A. This Court And The Federal Circuit Courts Have Recognized That Protection Against Retaliation Is Implicit In The Non-Discrimination Mandate Of Civil Rights Statutes And The Constitution.

1. When Congress enacted Title IX in 1972, this Court had already established that a right to be free of retaliation is implicit in the right to be free from discrimination. If

schools and other defendants could freely retaliate against those who protest discriminatory treatment, they would effectively be engaging in the discrimination prohibited by statute. *See generally* Floyd D. Weatherspoon, *Don't Kill the Messenger: Reprisal Discrimination in the Enforcement of Civil Rights Laws*, 200 L. Rev. M.S.U.-D.C.L. 367 (2000) (retaliation one of most significant obstacles to enforcement of civil rights laws).

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court considered whether 42 U.S.C. § 1982, which prohibits discrimination in property transactions,[4] also protects those who complain about such discrimination from retaliation. Though the statute makes no reference to retaliation, the Court concluded that it protected a white man expelled from membership in his neighborhood board because he protested the community's unwillingness to approve assignment of his membership share when he rented to a black man. *Id.* at 237. The Court explained that if the expulsion "can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* For the same reason, the Court later held that although neither the United States Constitution nor 42 U.S.C. § 1983 expressly bars retaliation, reprisal discrimination must be actionable under § 1983 in order to make meaningful the rights protected by the statute and Constitution.[5] *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173-74 (1970); *Perry v. Sindermann*, 408 U.S. 593, 597

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[4] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[5] Section 1983 provides a cause of action for individuals who have been deprived, "under color" of law, of any of the "rights, privileges, or immunities secured by the Constitution and laws."

(1972); *see also Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) ("The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right.").

2. Following this Court's lead, the federal courts of appeals have held that other civil rights statutes that do not expressly address retaliation provide causes of action to redress such conduct. Several courts of appeals, for instance, have concluded that 42 U.S.C. § 1981, prohibiting discrimination in contracting,[6] gives rise to a cause of action for retaliation. *See, e.g., Foley v. Univ. of Houston Sys.*, 324 F.3d 310, 315 (5th Cir. 2003) (right to be free from retaliation under § 1981 is "clearly established" for purposes of qualified immunity); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411-13 (11th Cir. 1998) (upholding claim of retaliation under § 1981); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000) (relying on *Sullivan* in recognizing retaliation claim under § 1981); *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144, 1149 n.7 (4th Cir. 1980) (§ 1981 affords a "remedy for both the initial expulsion and the retaliatory expulsions"). The same is true of the Age Discrimination in Employment Act, 29 U.S.C. § 621. *See, e.g., Forman v. Small*, 271 F.3d 285, 298 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) (federal employees protected against retaliation despite absence of express provision). The principle on which the courts rely is the same as the one articulated by this Court in *Sullivan*: because retaliation bears "a symbiotic and inseparable relationship" to discrimination, *Peters*, 2003 WL 1908728, at *8, "a prohibition on discrimination should be judicially construed to include an implicit prohibition on

[6] Section 1981 provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

retaliation against those who oppose the prohibited discrimination," *id.* at *7 (recognizing cause of action for retaliation under Title VI).

3. The *Sullivan* principle also applies to Title IX and its non-discrimination mandate. The court below suggested that because Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, expressly prohibits retaliation by private employers, the absence of a similar provision in Title IX "may indicate" that Title IX does not cover retaliation. App. 20a n.12. That reasoning is not only contrary to the decisions of this Court discussed just above, but also unsound on its own terms.

First, the statutory structures of Title IX and Title VII are entirely different. In contrast to the expansive language of § 901 of Title IX, Title VII spells out in detail the conduct that does and does not violate the statute. 42 U.S.C. §§ 2000e-2 and 3. Because Congress did not bar *any* specific discriminatory practices under Title IX, the failure to prohibit one particular practice, such as retaliation, says nothing about whether that practice is permissible. Second, Title VII itself has been construed to prohibit retaliation even where it does not expressly do so. When Title VII was amended to reach federal employees in 1972, Congress did not specifically incorporate the anti-retaliation provision into this new section. *See* 42 U.S.C. § 2000e-16. Despite this absence, the courts have held uniformly that Title VII does protect federal workers against retaliation. *See, e.g., Aronberg v. Walters*, 755 F.2d 1114, 1115-16 (4th Cir. 1985); *Canino v. EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983).

The logic of *Sullivan* and its progeny should apply especially forcefully in contexts – like the Title IX context – in which internal conciliation and voluntary compliance can put an end to discriminatory practices quickly and effectively. Internal compliance efforts depend on the willingness of employees, students, and others to come forward with informa-

tion about potentially unlawful discrimination – to do exactly what petitioner Jackson did in this case. Those enforcement efforts would be undermined significantly – and discrimination thus perpetuated, *see Sullivan*, 396 U.S. at 237 – if individuals who bring discrimination to the attention of the appropriate officials are not protected against retaliation.

B. Congress Intended To Prohibit Retaliation Under Title IX.

1. As this Court has recognized, Congress intended to prohibit a broad range of discriminatory conduct when it enacted Title IX. "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" *North Haven*, 456 U.S. at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1996)) (alteration in original). In *North Haven*, the Court reasoned that if the statute does not expressly or impliedly *exclude* a particular discriminatory practice from coverage – there, discrimination in hiring – the default assumption should be that Title IX is intended to reach the practice. *Id.* Taking the same expansive view of Congress' intent in enacting Title IX, the Court has construed the general terms of the statute to reach such conduct as student-on-student sexual harassment, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653 (1999), and to make damages available in private actions, *Franklin v. Gwinnett County Pub. Sch. Sys.*, 503 U.S. 60, 76 (1992).

2. There is considerable evidence that Congress specifically intended to prohibit retaliation under Title IX. The Department of Education's anti-retaliation regulation, 34 C.F.R. § 100.7(e), along with other regulations promulgated under Title IX, was submitted to Congress under a statutorily mandated procedure designed to determine whether "the regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood." *Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th Cong., 1st Sess. 1 (1975) (statement of Rep. O'Hara, Chair of the Subcommittee). Following the submission of those regulations, Congress held multiple hearings to consider several proposed resolutions of disapproval, all of which it failed to approve.

As a result, those regulations, including the anti-retaliation regulation, became effective with implicit congressional blessing. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 521, 531-35 (1982)(discussing post-enactment history of Title IX regulations). While post-enactment developments are not dispositive, this Court recognized in discussing all the Title IX regulations that "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Id.* at 535 (internal quotation marks and citations omitted).[7]

Additional evidence of the relevant "legislative intent" can be found in the congressional hearings that preceded enactment of Title IX. Congress heard abundant testimony about the prevalence of retaliation against students and employees who protested sex discrimination in educational settings, and about the toll such retaliation exacted. *See Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 91st Cong., 2d Sess. 242 (1970) (testimony of Dr. Ann Harris) ("women who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for ac-

[7] Although a similar requirement for Congressional approval was later invalidated by this Court, *INS v. Chadha*, 462 U.S. 919 (1983), that holding does not undermine the weight of Congress' approval of the Title IX regulations at issue here.

tions such as outright plagiarism"); *id.* at 302 (statement of Bernice Sandler) ("It is also very dangerous for women students or women faculty to openly complain of sex discrimination on their campus. * * * At a recent meeting of professional women I counted at least four women whose contracts were not renewed after it became known that they were active in fighting sex discrimination at their respective institutions."); *id.* at 463 (testimony of Daisy Fields) ("few women have dared to file complaints of sex discrimination" because "[w]e know of a number of such cases" in which "women who have filed complaints have suffered reprisals in the form of having their jobs abolished" or "have been reassigned to some degrading position far below their capabilities in anticipation they might resign"); *id.* at 588 (statement of Women's Rights Commission of New York Univ. Sch. of Law) ("It was recently discovered that one woman had tried to get [the dormitory] opened up ten years ago, when the whole building * * * was closed to women. She raised a complaint at a faculty meeting about this situation; blackballing letters written by faculty members were subsequently placed in her employment file at the law school without her knowledge."); *id.* at 1051 (reprinting magazine article) ("A few [women] fight back – and pay the penalty for bucking the male dominated system."); *see also* 118 Cong. Rec. 5812 (1972) (reprinting article stating that "on some campuses it is still dangerous to fight sex discrimination. I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such discrimination").

Particularly when assessed against the background principle that Congress anticipated that Title IX would sweep broadly, the relevant legislative history confirms that Title IX was intended to prohibit retaliation. Though the court below pays lip-service to the relevance of the "legislative history and context within which [Title IX] was passed," App. 13a (quoting *Sandoval*, 532 U.S. at 288), it never addresses that history, and its holding is inconsistent with the best evidence of Congress' intent.

III. THE FEDERAL AGENCIES RESPONSIBLE FOR IMPLEMENTING AND ENFORCING TITLE IX PROPERLY CONSTRUE THE STATUTE TO PROHIBIT RETALIATION.

In light of the precedent and legislative history discussed above, there is no question but that Title IX is intended to and does preclude reprisal discrimination. But even if there were some doubt on that score, it would be resolved by the interpretations adopted by the federal agencies chiefly responsible for implementing and enforcing the statute. The court below erred again when it failed to accord proper deference to the positions of the Department of Education and the Department of Justice, both of which construe Title IX to prohibit retaliation.

1. The Department of Education (formerly part of the Department of Health, Education and Welfare) historically has been the agency "charged with the responsibility for administering Title IX." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 706-08 & n.42 (1979) (discussing agency position with respect to Title IX). For over two decades, an executive order has made the Department of Justice responsible for "coordinat[ing] the implementation and enforcement" of Title IX by all executive agencies. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). The long-standing and consistent view of both those agencies is that Title IX prohibits retaliation against those who protest unequal treatment in educational settings.

The Department of Education promulgated 34 C.F.R. 100.7(e) (applicable to Title IX via incorporation under 34 C.F.R. 106.71), the regulation expressly prohibiting retalia-

tion under Title IX.[8] The Department of Justice treats retaliation as prohibited conduct in its Title IX enforcement manual. Dept. of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001). As explained in the manual: "A right cannot exist in the absence of some credible and effective mechanism for its enforcement and enforcement cannot occur in the absence of a beneficiary class willing and able to assert the right. In order to ensure that beneficiaries are willing and able to participate in the enforcement of their own rights, a recipient's retaliation against a person who has filed a complaint . . . violates Title IX." *Id.* at 70. The two agencies recently filed a joint *amicus* brief before the Fourth Circuit, arguing that Title IX prohibits retaliation and gives rise to a private right of action to redress retaliatory conduct. *See generally* U.S. *Litman* Brief, *supra*.

2. The positions of the agencies responsible for implementing and enforcing Title IX are entitled to substantial deference in construing the statute. The Department of Education's anti-retaliation regulation, of course, is due considerable deference under the *Chevron* standard: so long as the agency's position is not unambiguously precluded by the statute, the courts must defer. *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see Yellow Transp., Inc. v. Michigan*, 123 S. Ct. 371, 377 (2002) (discussing *Chevron* deference). Here, as discussed above, the Department's position is not only consistent with the statute and its legislative history, but also vital to enforcement of the statutory anti-discrimination mandate. Under *Sandoval*, it is an "authoritative interpretation of the statute"

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[8] *See also* Dept. of Educ. Sexual Harassment Guidelines, 62 Fed. Reg. 12,034, 12,044 (Mar. 13, 1997) ("retaliation is prohibited by Title IX"); Dept. of Educ. Revised Sexual Harassment Guidelines, 65 Fed. Reg. 66,092, 66,106 (Nov. 2, 2000) (draft for public comment); Dept. of Educ. Revised Sexual Harassment Guidance, 66 Fed. Reg. 5,512 (Jan. 19, 2001) (Notice of Availability).

enforceable via Title IX's implied right of action. 532 U.S. at 284.

The Department of Justice's position, reflected in both its *Title IX Legal Manual* and its brief in *Litman*, is also entitled to deference. *See Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (fact that agency "reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due"). Indeed, when Congress charges multiple agencies with enforcing a statute, this Court generally gives special deference to the interpretations of the agency charged by Executive Order with coordinating government-wide compliance. *See Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11303

D. C. Docket No. 01-01866 CV-PT-S

RODERICK JACKSON,

Plaintiff-Appellant,

versus

BIRMINGHAM BOARD OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(October 21, 2002)

Before DUBINA, MARCUS and GOODWIN*, Circuit Judges.

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* Honorable Alfred T. Goodwin, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

MARCUS Circuit Judge:

Roderick Jackson appeals the dismissal of his complaint alleging that the Birmingham Board of Education (the "Board") retaliated against him in violation of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 et seq., and the regulations implementing it. While employed by the Board as the coach of a girl's basketball team, Jackson complained about practices that he believed discriminated against his team in violation of Title IX. The school, he maintains, retaliated against him by removing him from his coaching position. The question before us is whether Title IX implies a private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others. After review of the text and structure of the statute, we can discern no congressional intent in Title IX to create by implication such a private cause of action. Accordingly, we affirm the dismissal of Jackson's complaint.

I.

A.

We review de novo an order granting a motion to dismiss the complaint, see McDonald v. S. Farm Bureau Life Ins. Co., 291 F.3d 718, 722 (11th Cir. 2002), taking the facts alleged in the complaint as true and construing them in the light most favorable to the plaintiff. See Covad Communications Co. v. Bellsouth Corp., 299 F.3d 1272, 1276 n.2 (11th Cir. 2002); Stephens v. Dep't of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990) ("On a motion to dismiss, the facts stated in appellant's complaint and all reasonable inferences therefrom are taken as true."). "A motion to dismiss is only granted when the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Harper v. Blockbuster Entm't Corp., 139 F.3d

1385, 1387 (11th Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)).

B.

According to his complaint, Jackson was hired by the Board as a physical education teacher and girls' basketball coach on or about August 1993. He was transferred to Ensley High School in August 1999, where his duties included coaching the girls' basketball team. While coaching at Ensley, Jackson came to believe that the girls' team was denied equal funding and equal access to sports facilities and equipment. He complained to his supervisors about the apparent differential treatment and, shortly thereafter, he began receiving negative work evaluations. Jackson was ultimately relieved of his coaching duties in May 2001, but remains employed as a tenured physical education teacher.

We assume for purposes of this appeal that the Board retaliated against Jackson for complaining about perceived Title IX violations. The only question before us today is whether Title IX provides Jackson a private right of action and a private remedy against the Board for its allegedly retaliatory actions. Conceding that Title IX creates no private rights of action expressly, see Cannon v. Univ. of Chicago, 441 U.S. 677, 683, 99 S. Ct. 1946, 1950, 60 L. Ed. 2d 560 (1979) ("The statute does not . . . expressly authorize a private right of action by a person injured by a violation of § 901."), Jackson claims that such a right is impliedly created by §§ 901 and 902 of Title IX, 20 U.S.C. §§ 1681-82, in conjunction with 34 C.F.R. § 100.7(e), an anti-retaliation regulation promulgated by the Department of Education to enforce Title IX.

Section 901 of Title IX, with certain exceptions not at issue here, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).[1]

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[1] In relevant part, § 901, 86 Stat. 373, as amended, as set forth in 20 U.S.C. § 1681, provides:

> (a) Prohibition against discrimination; exceptions
>
> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .
>
> (b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance
>
> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.
>
> (c) "Educational institution" defined
>
> For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such terms means each such school, college, or department.

In section § 902, Congress created and authorized an elaborate administrative enforcement scheme for Title IX. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 638-39, 119 S. Ct. 1661, 1669, 143 L. Ed. 2d 839 (1999).[2] Pursuant to § 902, any federal department or agency that "is empowered to extend Federal financial assistance to any education program or activity" is "authorized and directed to

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[2] Section 902, 86 Stat. 374, as set forth in 20 U.S.C. § 1682, titled "Federal administrative enforcement; report to Congressional committees," provides in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . . No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . , or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

effectuate the provisions of" § 901. 20 U.S.C. § 1682. To do so, agencies are required to "issu[e] rules, regulations, or orders of general applicability," which do not "become effective unless and until approved by the President." Id. The primary enforcement mechanism that § 902 gives to agencies is cessation of federal funding: "[c]ompliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance . . . ." Id.

There are a number of procedural requirements that must be met, however, before an agency may cut off funding. First, an agency must attempt to obtain voluntary compliance with the requirements it has imposed to enforce § 901: "no . . . action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." Id. Second, if any agency fails to obtain voluntary compliance, an agency must hold a hearing regarding any alleged regulatory violation, because only a "recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with" a regulation enacted pursuant to § 902 may have its funding cut off. Id. Third, even after making an "express finding" of noncompliance, an agency may not cut off funding unless it files "a full written report" to "the committees of the House and Senate having legislative jurisdiction over the program or activity involved" and waits "until thirty days have elapsed after the filing of such report." Id.[3]

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[3] In addition to the congressional review required by § 902, § 903 of Title IX, 86 Stat. 374, as set forth in 20 U.S.C. § 1683, provides for judicial review of "[a]ny department or agency action taken pursuant to section [902]." 20 U.S.C. § 1683. Section 903 provides in full that:

> Any department or agency action taken pursuant to section 1682 or this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

Using the authority vested in it by § 902, the Department of Education promulgated 34 C.F.R. § 100.7(e),[4] which prohibits retaliation against anyone who complains of a Title IX violation:

> No receipt [of federal funds] or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section [901 of Title IX] of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e) (emphasis added).

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[4] 34 C.F.R. § 100.7(e) was originally promulgated by the Department of Justice to enforce Title VI of the Civil Rights Act of 1964 ("Title VI"), 78 Stat. 252, as amended, 42 U.S.C. § 200d et seq. The Department of Education has incorporated by reference § 100.7(e) and other regulations enforcing Title VI to enforce Title IX. See 34 C.F. R. § 106.71.

Jackson urges that a private right of action ought to be implied in his favor from the statute and, more particularly, from 34 C.F.R. § 100.7(e). We are unpersuaded. For the reasons we make clear below, we hold that neither Title IX itself nor 34 C.F.R. § 100.7(e) implies a private right of action for retaliation in Jackson's favor.

C.

Our analysis of Jackson's claim is governed in substantial measure by the Supreme Court's recent decision in Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), which we explicate fully for three reasons. First, Sandoval distills and clarifies the approach we are obliged to follow in determining whether to imply a private right of action for a statute.[5] Second, Sandoval

[5] The Supreme Court implied private rights of action with a relatively free hand, see J.I. Case Co. v. Borak, 377 U.S. 426, 433-34, 84 S. Ct. 1555, 1560, 12 L. Ed. 2d 423 (1964), until its decision in Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). In Cort, the Court articulated four factors that must be considered before a private right of action may be implied:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78, 95 S. Ct. at 2088 (quoting Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916)) (additional citations omitted). Since the late 1970's, the Court has gradually receded from reliance on three of these four factors, focusing more and more exclusively on legislative intent alone. See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16, 100 S. Ct. 242, 245, 62 L. Ed. 2d 146 (1979) ("While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, what must ultimately be determined is whether Congress intended to create the private remedy asserted . . . .") (citations omitted); Touche Ross & Co. v. Redington, 442 U.S. 560, 575, 99 S. Ct. 2479, 2489, 61 L. Ed. 2d 82 (1979) (the "central inquiry" is "whether Congress intended to create, either expressly or by implication, a private cause of action"); Thompson v. Thompson, 484 U.S. 174, 179, 108 S. Ct. 513, 516, 98 L. Ed. 2d 512 (1988) ("The intent of Congress remains the ultimate issue . . . .") Sandoval is the culmination of this trend, announcing that "[s]tatutory intent . . . is determinative." 532 U.S. at 286, 121 S. Ct. at 1519; see also Gonzaga Univ. v. Doe, -- U.S. --, 122 S. Ct. 2268, 2276-77, 153 L. Ed. 2d 309 (2002) (applying Sandoval mode of analysis). The other three Cort factors remain relevant only insofar as they provide evidence of Congress's intent. See Thompson, 484 U.S. at 189, 108 S. Ct. at 521 (Scalia, J., concurring in the judgment) (The Court has "convert[ed] one of [the Cort test's] four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence.") (emphasis or original).

resolved a claim under title VI of the Civil Rights Act of 1964 ("Title VI"), 78 Stat. 252, as amended, 42 U.S.C. § 2000d et seq., which is the model for Title IX and whose language Title IX copies nearly verbatim. See Cannon, 441 U.S. at 694-95, 99 S. Ct. at 1956-57 ("Title IX was patterned after Title VI . . . . Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class."); see also id. at 694-696 nn.16 & 19, 99 S. Ct. at 1956-57 nn. 16 & 19 (setting forth the legislative history of Title IX, which, inter alia, notes that "[t]his is identical language, specifically taken from Title VI"). Because we therefore read Titles VI and IX in pari materia, Sandoval's interpretation of Title VI powerfully informs our reading of Title IX. Third, like Jackson, the plaintiffs in Sandoval relied on a regulation promulgated to enforce Title VI as the basis for implying a private right of action.

In Sandoval, the Supreme Court held that Title VI does not imply a right of action for private litigants to sue recipients of federal funds for "disparate impact" violations. See Sandoval, 532 U.S. at 293, 121 S. Ct. at 1523. At issue in Sandoval was the claim that the Alabama Department of Public Safety's policy of administering all tests for drivers' licenses in English only has a discriminatory effect on racial minorities. Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Recognizing that Title VI itself reaches only acts of intentional discrimination, see Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct, 712, 716, 83 L. Ed. 2d 661 (1985), the plaintiff in Sandoval alleged that Alabama's restriction violated 28 C.F.R. § 42.104(b)(2), a Department of Justice regulation promulgated pursuant to § 602 of Title VI, [6] that forbids recipients of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ." 28 C.F.R. § 42.104(b)(2) (1999) (emphasis added).[7]

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[6] Section 602 authorizes and directs "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . to effectuate the provisions of [§ 601] with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . ." 42 U.S.C. § 2000d-1.

[7] 28 C.F.R.§ 42.104(b)(2) provides in full that:

> A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

The Department of Transportation has promulgated an identical regulation. See 49 C.F.R. § 21.5(b)(2).

The Court in Sandoval held that, although a private cause of action exists to enforce § 601, see 532 U.S. at 279, 121 S. Ct. at 1516 ("private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"), that right plainly does not extend to the enforcement of disparate impact regulations promulgated under § 602. See Sandoval, 532 U.S. at 293, 121 S. Ct. at 1523.

In reaching this decision, the Supreme court stressed that legislative intent is the only basis upon which a private right of action may be inferred:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them

> may be a proper function for common-law courts, but not for federal tribunals.

Id. at 286-87, 121 S. Ct. at 1519-1520 (citations and quotations omitted and emphasis added); see also Gonzaga University v. Doe, -- U.S. --, 122 S. Ct. 2268, 2276, 153 L. Ed. 2d 309 (2002) (The inquiry "simply require[s] a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.").

Sandoval also clearly delimits the sources that are relevant to our search for legislative intent. First and foremost, we look to the statutory text for "'rights-creating' language." Sandoval, 532 U.S. at 288, 121 S. Ct. at 1521; see also Gonzaga University, 122 S. Ct. at 2275 n.3 ("Where a statute does not include this sort of explicit 'right- or duty-creating language' we rarely impute to Congress an intent to create a private right of action."); Cannon, 441 U.S. at 690 n.13, 99 S. Ct. at 1954 n.13 ("Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."). "Rights-creating language" is language "explicitly conferr[ing] a right directly on a class of persons that include[s] the plaintiff in [a] case," Cannon, 441 U.S. at 690 n.13, 99 S. Ct. at 1954 n.13, or language identifying "the class for whose especial benefit the statute was enacted." Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916), quoted in Cannon, 441 U.S. at 689 n.10, 99 S. Ct. at 1953 n.10. In contrast, "statutory language customarily found in criminal statutes . . . and other laws enacted for the protection of the general public," or a statute written "simply as a ban on discriminatory conduct by recipients of federal funds," provides "far less reason to infer a private remedy in favor of individual persons." Cannon, 441 U.S. at 690-93, 99 S. Ct. at 1954-55.

Second, we examine the statutory structure within which the provision in question is embedded. If the statutory structure provides a discernible enforcement mechanism, Sandoval teaches that we ought not imply a private right of action because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Sandoval, 532 U.S. at 290, 121 S. Ct. at 1521-22.[8]

Third, if (and only if) statutory text and structure have not conclusively resolved whether a private right of action should be implied, we turn to the legislative history and context within which a statute was passed. See Sandoval, 532 U.S. at 288, 121 S. Ct. at 1520 ("In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text.") (citation omitted).[9] We examine legislative history with a skeptical eye, because "[t]he bar for showing legislative intent is high. 'Congressional intent to create a

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[8] See also Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 533, 109 S. Ct. 1282, 1286-87, 103 L. Ed. 2d 539 (1989) ("[I]t is . . . 'an elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.") (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242, 246, 62 L. Ed. 2d 146 (1979)); McDonald, 291 F.3d at 725 ("When Congress creates certain remedial procedures, we are, 'in the absence of strong indicia of contrary congressional intent, . . . compelled to conclude that Congress provided precisely the remedies it considered appropriate.'") (alteration in original) (quoting Karahalios, 489 U.S. at 533, 109 S. Ct. at 1286-87 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 15, 101 S. Ct. 2615, 2623, 69 L. Ed. 2d 435 (1981))).

[9] See also Thompson, 484 U.S. at 179, 107 S. Ct. at 516 ("Congress' intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.'") (quoting Transamerica Mortgage Advisors, 444 U.S. at 18, 100 S. Ct. at 246); McDonald, 291 F.3d at 723 ("Legislative history can be taken into account where relevant, but the central focus of judicial inquiry must be the 'text and structure' of the statute itself.") (citation omitted).

private right of action will not be presumed. There must be clear evidence of Congress's intent to create a cause of action.'" McDonald, 291 F.3d at 723 (quoting Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1345 (11th Cir. 1997)). Moreover, the legislative history of a statute that is itself unclear about whether a private right of action is implied is unlikely to provide much useful guidance. See Cannon, 441 U.S. at 694, 99 S. Ct. at 1956 ("[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.").

Relying exclusively on the text and structure of Title VI, see Sandoval, 532 U.S. at 288, 121 S. Ct. at 1520 ("We . . . begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."), the Court in Sandoval concluded that Title VI implies no private right to sue for actions not motivated by discriminatory intent that result in a disparate impact. See id. at 293, 121 S. Ct. at 1523. Examining § 601, the Court determined that it does not imply a private right of action for disparate impact claims, because, as noted above, "§ 601 prohibits only intentional discrimination." Id. at 280, 121 S. Ct. at 1516.

The Court turned next to § 602, which, like § 902 of Title IX, authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. The Court concluded that this provision does not imply a private right of action. It first observed that "'rights-creating' language . . . is completely absent from § 602." Sandoval, 532 U.S. at 288, 121 S. Ct. at 1521. Indeed, "[f]ar from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuat[ing]' rights already created by § 601." Id. at 289, 121 S. Ct. at 1521 (second alteration in original) (citation omitted). Further, the Court noted,

> the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.

Id. (quoting California v. Sierra Club, 451 U.S. 287, 294, 101 S. Ct. 1775, 1779, 68 L. Ed. 2d 101 (1981)); see also Touche Ross & Co. v. Redington, 442 U.S. 560, 576, 99 S. Ct. 2479, 2489, 61 L. Ed. 2d 82 (1979) ("The question whether Congress . . . intended to create a private right of action [is] definitely answered in the negative" where a "statute by its terms grants no private rights to any identifiable class[.]"). The Court thus concluded that, "[s]o far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action." Sandoval, 532 U.S. at 289, 121 S. Ct. at 1521.

The Court also found that "the methods § 602 . . . provide[s] for enforcing its authorized regulations . . . suggest" an intent not to create a private right of action. Id. Section 602 provides for extensive administrative enforcement, as well as "elaborate restrictions" of that enforcement, which "tend[s] to contradict a congressional intent to create privately enforceable rights through § 602 itself." Id. at 290, 121 S. Ct. at 1521. In fact, the Court continued, "[t]he express provision of one method of

enforcing a substantive rule suggests that Congress intended to preclude others." Id. at 290, 121 S. Ct. at 1522.[10]

Having determined that § 601 does not imply a private right of action for disparate impact claims and that § 602 does not imply any private right of action at all, the Court concluded that the regulations promulgated by agencies with the power granted to them by § 602 to enforce the provisions of § 601 also cannot be the basis of an implied private right of action for disparate impact claims:

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress.

[10] The Court observed that the suggestion created by an extant enforcement scheme that Congress did not intend to create another enforcement mechanism is "[s]ometimes . . . so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute (such as language making the would-be plaintiff 'a member of the class for whose benefit the statute was enacted') suggest the contrary." Id. at 290, 121 S. Ct. at 1522 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S., 134, 145, 105 S. Ct. 3085, 3092, 87 L. Ed. 2d 96 (1985)). We need not address any potential tension between the language of a statute and its structure, however, because Jackson's claim creates no conflict between Title IX's text and its structure.

> Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Id. at 291, 121 S. Ct. at 1522 (citations and quotations omitted); see also Touche Ross, 442 U.S. at 577 n.18, 99 S. Ct. at 2489 n.18 ("[T]he language of the statute and not the rules must control"). Thus, while regulations that merely interpret a statute may provide evidence of what private rights Congress intended to create, see Sandoval, 532 U.S. at 284, 121 S. Ct. at 1518 ("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."), "regulations that go beyond what the statute itself requires" are not enforceable through a private right of action. Id. at 293, n.8, 121 S. Ct. at 1523 n.8. Sandoval thus concluded there is no private right of action to pursue disparate impact claims under Title VI.

II.

With this template in front of us, we turn to Jackson's contention that Title IX, in conjunction with 34 C.F.R. § 100.7(e), implies a private right of action to remedy the type of retaliation he claims to have suffered.

As noted above, Title IX does not expressly provide any private right of action. See supra at ___. In Cannon v. Univ. of Chicago, 441 U.S. 677, 688-89, 99 S. Ct. 1946, 1953, 60 L. Ed. 2d 560 (1979), however, the Supreme Court held that Title IX implies a private right of action in favor of direct victims of gender discrimination. A woman who was denied admission by two medical schools brought suit against the schools under Title IX, alleging that their admissions policies discriminated against women. Carefully applying the four-part test set out in Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct.

2080, 2088, 45 L. Ed. 2d 26 (1975), see supra note ___,[11] the Court found that Title IX implies a private right of action "in

[11] The Court first noted that the text of § 901 "explicitly confers a benefit on persons discriminated against on the basis of sex." Cannon, 441 U.S. at 694, 99 S. Ct. at 1956. That is, Title IX contains precisely the type of "rights-creating language" in favor of an identifiable class -- victims of gender discrimination -- that militates in favor of implying a private right of action. The second Cort factor, the Court likewise found, cuts in favor of finding a private right of action, because at the time of Title IX's passage, Title VI -- on which Title IX was modeled, see supra at ___ -- was understood to imply a private right of action. See Cannon, 441 U.S. at 696, 99 S. Ct. at 1957 ("In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy."). Congress, the Court reasoned, was therefore aware that Title IX would be interpreted similarly and tacitly consented to this interpretation.

Under the third Cort factor, the Court gleaned from Title IX's legislative history that it was enacted to promote "two related, but nevertheless somewhat different, objectives:" "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." Cannon, 441 U.S. at 704, 99 S. Ct. at 1961; see also id. at 704 n.36, 99 S. Ct. at 1961 n.36 (discussing legislative history of Title IX); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286, 118 S. Ct. 1989, 1997, 141 L. Ed. 2d 277 (1998). The Court observed that the first of these objectives is "generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices" set forth in § 902. Cannon, 41 U.S. at 704, 99 S. Ct. at 1961. Cutting off federal funding is, however, a "severe" remedy of "last resort" that "often may not provide an appropriate means of accomplishing the second purpose . . . ." Id. at 704-705 & n.38, 99 S. Ct. at 1961-62 & n.38. The Court thus concluded that "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with -- and in some cases even necessary to -- the orderly enforcement of the statute." Id. at 705-06, 99 S. Ct. at 1962.

Finding the fourth Cort factor also favored implying a private right of action, the Court in Cannon concluded that "all of [the Cort factors] support the same result. Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." Id. at 709, 99 S. Ct. at 1964 (emphasis added).

favor of private victims of discrimination." Id. at 709, 99 S. Ct. at 1964 (emphasis added). The Court implied this private right of action in the plaintiff's favor based, not on § 902 or the regulations promulgated pursuant to it, but exclusively on the text, structure, and legislative history of § 901.

The Supreme Court has plainly receded from the four-part Cort analysis that animated Cannon, focusing instead only on congressional intent to create a private right of action. See supra note ___. But the court has not overturned the specific holding of Cannon, and so a direct victim of gender discrimination still may pursue a private right of action under Title IX to remedy the discrimination she has suffered.

In Cannon, however, the Supreme Court had no occasion to address the questions before us today: whether Title IX implies a private right of action to redress retaliation resulting from Title IX complaints or whether individuals other than direct victims of gender discrimination have any private rights under Title IX at all. Nor has any subsequent decision of the Supreme Court or this Court resolved these questions. We therefore face the basic question of whether to imply a private right of action and a private remedy for retaliation in favor of an individual who is not himself a direct victim of gender discrimination. After reading Title IX in the manner required by Sandoval, we can find nothing in the language or structure of Title IX creating a private cause of action for retaliation, let alone a private cause of action for retaliation against individuals other than direct victims of gender discrimination.

A.

We begin with the text of § 901. See supra at ___. Section 901 aims to prevent and redress gender discrimination and does so by requiring that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); see also Cannon, 441 U.S. at 704, 99 S. Ct. at 1961. Nothing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations. Indeed, the statute makes no mention of retaliation at all.[12] Our task, as Sandoval makes clear, is to interpret what congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of retaliation in Title IX therefore weight powerfully against a finding that Congress intended Title IX to reach retaliatory conduct. See Litman v. George Mason Univ., 156 F. Supp. 2d 579, 584-85 (E.D. Va. 2001) ("Congress was aware that it could create a right of action for retaliatory treatment, and it did so in Title VII; it did not do so in Title IX.").

Section 902 of Title IX, see supra note ___, does not vary our conclusion that Congress did not intend Title IX to

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[12] In contrast, when Congress wished to prohibit retaliation against individuals who complain about employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq., it did so explicitly as part of the statute itself. See 42 U.S.C. § 2000e-3(a). The anti-retaliation section of Title VII provides in pertinent part that it shall be an unlawful employment practice for any employer to retaliate against an employee or an applicant for employment "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). We recognize that Title VII is of limited usefulness in interpreting Title IX, both because Title VII was enacted pursuant to Congress's Commerce power, while both Title VI and IX were enacted pursuant to Congress's Spending Clause power, and because the text and structure of Title VII are markedly different than that of Title IX. See Gebser, 524 U.S. at 286, 118 S. Ct. 1989. Nonetheless, the fact that Congress felt required to prohibit retaliation expressly under Title VII may indicate that Congress did not intend the concept of "discrimination" in Title IX to be read sufficiently broadly to cover retaliation.

prohibit retaliation. Section 902, like its twin § 602, is devoid of "rights-creating" language of any kind -- whether against gender discrimination, retaliation, or any other kind of harm. Instead, again like § 602, it explicitly directs and authorizes federal agencies to regulate recipients of federal funding to effectuate the anti-discrimination provisions of § 901. As detailed above, see supra at ___, it provides an enforcement mechanism -- the cessation of federal funding -- and imposes "elaborate restrictions on agency enforcement." Sandoval, 532 U.S. at 290, 121 S. Ct. at 1521. These restrictions include requirements that agencies first attempt to attain voluntary compliance, that agencies hold a hearing and make express findings of noncompliance before cutting off funding, and that agencies provide Congress thirty days to consider any proposed funding cut off. See 20 U.S.C. § 1682. That § 902 is thus concerned exclusively with the power of federal agencies to regulate recipients of federal funds renders its focus, like § 602's, "twice removed" from any consideration of what harm Title IX is meant to remedy. Sandoval, 532 U.S. at 289, 121 S. Ct. at 1521. Section 902 plainly does not disclose any congressional intent to imply a private right of action of any kind, let alone against retaliation.

Moreover, as Sandoval teaches, Section 902's provision of an administrative enforcement mechanism, coupled with § 903's provision of judicial review, strongly counsels against inferring a private right of action against retaliation, because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Sandoval, 532 U.S. at 290, 121 S. Ct. at 1521-22.

We conclude, much like the Supreme Court did in Sandoval, that nothing in the text or structure of §§ 901 and 902 yields the conclusion that Congress intended to imply a private cause of action for retaliation. While we "have a

measure of latitude to shape a sensible remedial scheme that best comports with the statute" when determining the scope of a judicially implied right and the remedies it makes available, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284, 118 S. Ct. 1989, 1996, 141 L. Ed. 2d 277 (1998), we are not free to craft a right that there is no evidence Congress intended to create. See id. ("[W]e generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose."); see also id. at 285, 118 S. Ct. at 1997 (We must "'attempt to infer'" from all available indicia "'how the [1972] Congress would have addressed the issue had the . . . action been included as an express provision in the' statute.") (alterations in original) (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 178, 114 S. Ct. 1439, 1448, 128 L. Ed. 2d 119 (1994)); Sandoval, 532 U.S. at 286, 121 S. Ct. at 1519 ("Statutory intent . . . is determinative."). Our review of §§ 901 and 902 unearths absolutely no indication that Congress intended Title IX to prevent or redress retaliation. Because the text thus evinces no concern with retaliation, we are not free to imply a private right of action to redress it.

Nor does 34 C.F.R. § 100.7(e)'s prohibition on retaliation, see supra at ___, imply such a private right of action or create a private remedy. It is true, as Jackson asserts, that § 100.7(e) identifies a class to which it extends its protection: "any individual" retaliated against for "complain[ing], testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding or hearing" undertaken to enforce Title IX. This regulatory identification of a protected class cannot be taken, however, as "rights-creating," for the simple reason that "[l]anguage in a regulation . . . may not create a right that Congress has not." Sandoval, 532 U.S. at 291, 121 S. Ct. at 1522. Quite simply, if Congress did not enact a statute creating a private

cause of action, we cannot find its intent to do so in this regulation. Because Congress has not created a right through Title IX to redress harms resulting from retaliation, 34 C.F.R. § 100.7(e) may not be read to create one either.[13]

B.

Moreover, even if Title IX did aim to prevent and remedy retaliation for complaining about gender discrimination, Jackson is plainly is not within the class meant to be protected by Title IX. As Cannon held, § 901 identifies victims of gender discrimination as the class it aims to benefit, and so implies a private right of action in their favor. Nowhere in the text, however, is any mention made of individuals other than victims of gender discrimination. Gender discrimination affects not only its direct victims, but also those who care for, instruct, or are affiliated with them -- parents, teachers, coaches, friends, significant others, and coworkers. Congress could easily have provided some protection or form of relief to these

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[13] In our only previous encounter with the question, we expressly declined to resolve whether 34 C.F.R. § 100.7(e) creates a private right of action for retaliation. See Paisey v. Vitale, 807 F.2d 889, 895 n.8 (11th Cir. 1986) ("Paisey . . . makes the argument that . . . he is entitled to an injunction as part of his relief pursuant to his private cause of action against Nova for violation of the anti-retaliation regulation. That issue is not properly before us."). Before *Sandoval*, the Fourth Circuit had determined that a victim of gender discrimination does have a private right of action for retaliation. See Preston v. Commonwealth of Va. ex rel. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994) ("Retaliation . . . for filing a claim of gender discrimination is prohibited under Title IX."). The only two cases that have resolved a claim for retaliation under Title IX after Sandoval -- both of which were decided by district courts -- have both reached the opposite conclusion. See Atkinson v. Lafayette Coll., 2002 WL 123449 at *11 (E.D. Pa. Jan. 29, 2002) ("[I]n the wake of Sandoval, there is no private right of action under Title IX to enforce the anti-retaliation regulation. . . ."); Litman, 156 F. Supp. 2d at 584-85 ("Congress was aware that it could create a right of action for retaliatory treatment, and it did so in Title VII; it did not do so in Title IX.").

other interested individuals had it chosen to do so -- especially for a harm as plainly predictable as the retaliation here at issue[14] -- but it did not do so expressly. Nor does any language in § 902 evince an intent to protect anyone other than direct victims of gender discrimination. Indeed, as with § 602 of Title VI, the focus of § 902 is "twice removed" from victims of gender discrimination, Sandoval, 532 U.S. at 289, 121 S. Ct. at 1521, and, consequently, thrice-removed from individuals like Jackson who are not themselves the victims of gender discrimination. Here, there is quite simply no indication of any kind that Congress meant to extend Title IX's coverage to individuals other than direct victims of gender discrimination. We are not free to extend the scope of Title's IX protection beyond the boundaries Congress meant to establish, and we thus may not read Title IX so broadly as to cover anyone other than direct victims of gender discrimination.

We thus hold that Title IX does not imply a private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender

[14] In an analogous statutory context, claims for retaliation are often raised by individuals who are not themselves disabled but are affiliated with disabled individuals under § 504 of the Rehabilitation Act, 29 U.S.C. § 794. See, e.g., Weber v. Cranston Sch. Comm., 212 F.3d 41, 43-44 (1st Cir. 2000) (parent); Hoyt v. St. Mary's Rehab. Ctr., 711 F.2d 864, 865 (8th Cir. 1983) (friend); Lillbask v. Sergi, 193 F.Supp. 2d 503, 515 (D. Conn. 2002) (guardian); Whitehead v. Sch. Bd. for Hillsborough County, 918 F.Supp. 1515, 1522 (M.D. Fla. 1996) (parents); Ross v. Allen, 515 F.Supp. 972, 976 (S.D.N.Y. 1981) (school psychologist). Courts have generally found that a private right exists to redress this type of retaliation, but this is in large part because the statutory text of the Rehabilitation Act explicitly extends its remedies to "any person aggrieved by an act or failure to act by any recipient of Federal assistance . . . under section 794 of this title." 29 U.S.C. § 794a(a)(2) (emphasis added).

discrimination suffered by others.[15] Statutory intent remains the touchstone of our analysis. Without it -- and the mandate of Sandoval is crystal clear on this point -- we simply cannot imply a private right of action, no matter how desirable the result may be. And our review of both the text and structure of Title IX yields no congressional intent to create a cause of action for retaliation, particularly for a plaintiff who is not a

[15] As far as we can discern, we are the first court of appeals to resolve this question after the Supreme Court rendered its opinion in Sandoval. Our decision today is, we note, contrary to the lone circuit decision that addressed this question prior to Sandoval, Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242 (5th Cir. 1997). The Fifth Circuit held in Lowrey that 34 C.F.R. § 100.7(e) can of its own force provide the basis for an implied private right of action for retaliation suffered by individuals not themselves the victims of gender discrimination. See id. at 253. To reach this conclusion it relied on an earlier Fifth Circuit opinion that had observed in passing while construing the Wagner-Peyser Act of 1933 (which establishes the United States Employment Service, see 29 U.S.C. § 49 et seq.) that "civil remedies may be implied from regulations, as well as statutes." Gomez v. Fla. State Employment Ser., 417 F.2d 569, 576 n.29 (5th Cir., 1969). Ignoring the statutory text contained in §§ 901 and 902 of Title IX and focusing exclusively on 34 C.F.R. § 100.7(e), Lowrey applied the four-part Cort test to reach its conclusion that § 100.7(e) implies a private right of action. To reach this conclusion, Lowrey relied heavily on the third Cort factor -- finding that "the implication of a private right of action for retaliation would serve the dual purposes of title IX, by creating an incentive for individuals to expose violations of title IX and by protecting such whistleblowers from retaliation," id. at 254 (footnote omitted)-- while giving conspicuously little consideration to whether Congress intended to create such a private right of action.

After Sandoval, we believe the reasoning in Lowrey is unpersuasive. Accordingly, we do not follow Lowrey, either in its exclusive reliance on 34 C.F.R. § 100.7(e) to imply a private right of action, see Sandoval, 532 U.S. at 291, 121 S.Ct. at 1522 ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress."), or in its application of the Cort factors that gives short shrift to legislative intent. See Sandoval, 532 U.S. at 286-87, 121 S. Ct. at 1519-1520 ("Statutory intent . . . is determinative.").

direct victim of gender discrimination. Congress is, of course, free to create a private right of action for retaliation under Title IX and may extend its protection beyond direct victims of gender discrimination. Until it does so, however, Sandoval plainly precludes a federal court from implying such a right or expanding the class benefited by Title IX. The district court was therefore correct to dismiss Jackson's complaint.[16]

AFFIRMED

[16] Because we find that Jackson has no private right of action under Title IX, we do not reach the Board's other claims that (i) Jackson lacks standing to assert such a right because he has not suffered an adverse employment action, or that (ii) his claim for retaliation is preempted by the retaliation provisions of Title VII.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV-01-TMP-1866-S
	)	
BIRMINGHAM BOARD OF EDUCATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This cause comes to be heard on plaintiff Roderick Jackson's objection to the magistrate judge's Report and Recommendation entered on January 10, 2002.

The court adopts the magistrate judge's Report and Recommendation and overrules plaintiff's objections thereto. The court finds persuasive the case of *Holt v. Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995), *aff'd*, 109 F.3d 771 (11th cir. 1997) (TABLE, No. 96-6046), *cert. denied*, 522 U.S. 817 (1997). In the absence of controlling Eleventh Circuit or Supreme Court authority holding that Title IX expressly or implicitly creates a private cause of action for retaliation, the court finds that the Title IX does not create such a right. Thus, the defendant's motion to dismiss is **GRANTED** and the complaint in this action is **DISMISSED**.

DONE and **ORDERED** this 25th day of February 2002.

ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV-01-TMP-1866-S
	)	
BIRMINGHAM BOARD OF EDUCATION,	)	
	)	
	)	
Defendant.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This cause is before the court on the defendant's motion to dismiss the complaint, filed July 27, 2001. The motion to dismiss argues that the complaint is due to be dismissed because it fails to state a claim for which relief can be granted, the plaintiff lacks standing to assert a claim under Title IX of the Education Amendments of 1972, and the claim asserted is preempted by Title VII of the Civil Rights Act. Because the court agrees, it is recommended that the complaint be dismissed.

Procedural History

Plaintiff's complaint is expressly and exclusively grounded on the gender-discrimination provisions of Title IX of the Education Amendments of 1972, codified at 20 U.S.C. 1681, et seq. He alleges that he is employed by the defendant as a physical education teacher. He was transferred to Ensley High School in August 1999, where part of his duties involved coaching the girls' basketball

team. In doing so, he discovered that the girls' team was denied equal access to sports facilities and equipment, even being denied a key to the gymnasium. When he complained about the differential treatment of the girls' team, he received negative work evaluations and was ultimately relieved of his coaching duties in May 2001. He remains employed as a tenured physical education teacher.[1]

Defendant filed its motion to dismiss the complaint on September 10, 2001, asserting that any employment claims raised by plaintiff are preempted by Title VII of the Civil Rights Acts, that he has no standing to assert a claim under Title IX of the Education Amendments of 1972 because he was not the victim of the alleged gender discrimination (those being the members of the girls' basketball team), and that he has failed a allege a claim for which relief can be granted. On this latter ground, defendant argues that plaintiff's claim consists entirely of the contention that he suffered retaliation for complaining about the gender-discriminatory treatment of the girls' basketball team when his coaching duties were terminated in May 2001, and that Title IX, unlike Title VII, does not provide a remedy for retaliation. See Holt v. Lewis, 955 F. Supp. 1385 (N.D.Ala. 1995) aff'd 109 F.3d 771 (11th Cir. 1997) (TABLE, NO. 96-6046), cert. denied, 522 U.S. 817, 118 S. Ct. 67, 139 L.Ed.2d 29 (1997); Litman v. George Mason University, 156 F.Supp.2d 579 (E.D.Va. 2001). Plaintiff has responded to the motion, expressly eschewing any reliance on Title VII and contending that there is a growing trend nationwide

[1] Although the complaint states that plaintiff was "terminated" on May 7, 2001, the defendant's motion contends, and plaintiff concedes, that he is still employed as a tenured physical education teacher; only his coaching duties were terminated. Parties agreed at oral argument on the motion, however, that termination of the plaintiff's coaching duties also meant the end of his "coaching supplement" -- additional pay awarded to compensate teachers for coaching duties over and above their ordinary teaching duties.

recognizing retaliation claims under Title IX. See Lowrey v. Texas A & M University System, 117 F.3d 242 (5th Cir. 1997); Blalock v. Dale County Board of Education, 84 F.Supp.2d 1291 (M.D.Ala. 1999); Legoff v. Trustees of Boston University, 23 F.Supp.2d 120 (D. Mass. 1998); Clay v. Board of Trustees of Neosho County Community College, 905 F.Supp. 1488 (D.Kan. 1995). Plaintiff contends that this court should go with the trend.

Discussion

At the outset, the court agrees that plaintiff has no standing to assert the claims of the female members of the Ensley High School girls' basketball team for the substantive violations of their right to equal educational opportunities under Title IX. To the extent that the girls' basketball team was treated less favorably that the boys' basketball team in terms of facilities and equipment, a potential violation of Title IX occurred because the girls were the victims of discrimination due to their gender. Title IX, now codified as 20 U.S.C. § 1681, states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Clearly, subjecting female athletes to deprivations not suffered by comparable male athletes runs afoul of this provision. Nevertheless, the "persons" being subjected to the illegal discrimination are the female members of the basketball team, not the coach; it is they who are being "denied the benefits of" the educational activity of competitive basketball. Their coach has no standing to assert for them their claims of discrimination in this regard because he has suffered no personal loss or injury due to the discrimination, which is the *sine qua non* of standing. Thus, insofar as plaintiff bases his claim simply on the fact that the girl's basketball team was discriminatorily denied equal

access to sports facilities and equipment, he has no standing to prosecute the action.

The court also agrees that, to the extent plaintiff is asserting the discriminatory loss of some employment benefit, that is, his coaching duties and the supplemental pay that went with them, his claim must rest exclusively under Title VII, and not Title IX. Employment related discrimination by educational institutions is dealt with comprehensively by Title VII, which preempts any employment-discrimination claim under Title IX. See Lowrey v. Texas A & M University System, 117 F.3d 242 (5th Cir. 1997); Lakoski v. Thomas M. James, M.D., 66 F.3d 751 (5th Cir. 1995); Gibson v. Hickman, 2 F.Supp.2d 1481 (M.D.Ga., 1998); Hazel v. School Board of Dade County, Florida, 7 F.Supp.2d 1349 (S.D.Fla., 1998); Cooper v. Gustavus Adolphus College, 957 F. Supp. 191 (D.Minn. 1997); Howard v. Board of Education of Sycamore Community Unit School District, 893 F. Supp. 808 (N.D.Ill. 1995); Storey v. Board of Regents, 604 F. Supp. 1200 (W.D.Wis. 1985). Because plaintiff has expressly renounced any reliance on Title VII, any allegation of employment discrimination in the complaint fails to raise a claim for which relief can be granted under Title IX.

Finally, plaintiff also alleges that he was the victim of retaliation due to his complaints about the discriminatory treatment of the girls' basketball team. Defendant answers that Title IX, unlike Title VII, simply does not encompass a cause of action for retaliation. Although the court finds persuasive those cases, including Lowery, which recognize a retaliation claim under Title IX, it feels bound by the decision in Holt v. Lewis, which was affirmed without opinion by the Eleventh Circuit. First, it is correct that Title VII does not preempt a retaliation claim which is based on reprisal arising *not* due to *employment* discrimination. As Lowery makes clear, Title VII prohibits retaliation only for

complaints concerning or opposition to employment practices that are illegal under Title VII. Thus, if the nature of the plaintiff's complaints does not involve perceived *employment* discrimination, retaliation for making those complaints falls outside of Title VII. Here, plaintiff alleges that he complained about the discriminatory treatment of students, not discrimination in employment. Consequently, insofar as a retaliation claim might arise under Title IX, it is not preempted here.

Simply stated, however, the Eleventh Circuit's affirmance of Judge Acker's decision in Holt v. Lewis, 955 F. Supp. 1385 (N.D.Ala. 1995), aff'd, 109 F.3d 771 (11th Cir. 1997) (TABLE, NO. 96-6046), cert. denied, 522 U.S. 817, 118 S.Ct. 67, 139 L.Ed.2d 29 (1997), leaves this court with little option but to reject the argument that Title IX implicitly creates a private cause of action for retaliation. While neither Judge Acker's opinion nor the Eleventh Circuit's unpublished opinion, nor even the Supreme Court's denial of certiorari are binding, the affirmance by the court of appeals has very definite meaning. Although Eleventh Circuit Rule 36-2 clearly states that "Unpublished opinions are not considered binding precedent," it does not state that they have *no* precedential value. This court must assume that the court of appeals would not have affirmed Judge Acker's holding in Holt v. Lewis, unless they felt it was correct. Certainly, the judges of that court would not have affirmed a decision they believed was *wrong*. Thus, although it is an unpublished opinion, the affirmance by the court of appeals must be deemed, at least implicitly, as holding in agreement with Judge Acker that Title IX simply does not recognize a cause of action for retaliation.[2] That implicit holding by the

[2] The differing natures of appeal and certiorari are highlighted here. Any precedential value in the denial of certiorari by the Supreme Court can be disregarded by certiorari is a discretionary review, one which the Court may decline for reasons unrelated to the merits of the lower-court decision. The Eleventh circuit has no such luxury. It must decide cases properly appealed to it *on the merits*. Thus, its affirmance or reversal of a lower-court decision, even if unpublished, must be given some weight in any effort to interpret the law in this circuit.

Eleventh Circuit, if not binding on this court, certainly tips the scales of indecision in favor of that view. Thus, the court holds, consistent with Holt v. Lewis, as affirmed by the Eleventh Circuit, that no private cause of action for retaliation is found under Title IX, and plaintiff's complaint must be dismissed.

RECOMMENDATION

Based on the foregoing considerations, the magistrate judge RECOMMENDS that the defendant's motion to dismiss be GRANTED and the complaint in this action be DISMISSED.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal. Written objections shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

The Clerk is DIRECTED to forward a copy of this report and recommendation to all counsel of record.

DONE this 10th day of January, 2002.

T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-11303 BB

RODERICK JACKSON,

Plaintiff-Appellant,

versus

BIRMINGHAM BOARD OF EDUCATION,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: DUBINA, MARCUS and GOODWIN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

* Honorable Alfred T. Goodwin, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Supreme Court
FILED
JUL 15 2003
OFFICE OF THE CLERK

No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

In the decision below, the Eleventh Circuit correctly held that Title IX contains no implied private right of action for retaliation. Title IX contains no express private remedy of any kind and, there is no indication that Congress intended to create an implied private remedy for retaliation. The template for analysis of this issue is set forth in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), which held that Congressional intent is the key to implied private rights and remedies and that this intent can generally be ascertained solely from the text and structure of the statute. Title IX contains no reference to retaliation, which precludes any implied private remedy for retaliation.

The Eleventh Circuit also correctly held that administrative regulations cannot create an implied private remedy that Congress did not intend to create. Thus, 34 C.F.R. § 100.7(e) is not sufficient to create a private remedy for retaliation here.

The Petitioner's claim also fails because the Petitioner is not within the class of intended beneficiaries of Title IX, which is limited to persons discriminated against on the basis of sex with respect to federally funded educational programs.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY HELD THAT THERE IS NO IMPLIED RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX

The sole question before this Court is whether Title IX of The Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.* ("Title IX"), contains an implied private right of action for retaliation.[1] Specifically, this Court must determine whether such a private action exists, and if so, whether that right extends to one who was not a direct victim of gender discrimination. In response to this question, the Eleventh Circuit has correctly held that no such implied private right of action exists because the statute does not expressly prohibit retaliation, and because there was no Congressional intent to create such an implied right. Furthermore, the Eleventh Circuit was also correct in holding that the administrative regulations at issue could not create a remedy that Congress itself did not intend to create.

The Petitioner was a teacher employed by the Respondent as a physical education teacher and girls' basketball coach. During the 2000-01 school year he complained that the girls' basketball team received unequal funding and access to facilities, as compared to the boys' team. He alleges that he began receiving negative performance evaluations as a result of his complaints and that he was eventually relieved of his paid coaching duties, although he remained employed as a

1. Section 901 of Title IX is the principal statute at issue and it provides in pertinent part that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681.

teacher.[2] Since there is no express private remedy under Title IX, the Petitioner can prevail only if he can establish a valid implied private remedy for retaliation. The template for analysis of implied rights and remedies is set forth in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), which held that Congressional intent is the key to implied private rights and remedies and that this intent can generally be ascertained solely from the text and structure of the statute. *Sandoval* is dispositive of the instant case because its analysis shows that there was no Congressional intent to create an implied remedy for retaliation under Title IX.

A. *Sandoval* Is Dispositive and Establishes That Congress Did Not Intend to Create an Implied Private Right Against Retaliation

The Petitioner can recover under Title IX only if he can somehow establish Congressional intent to create an implied private right of action against retaliation. It is undisputed that Title IX does not create an express private right of action or private remedy of any kind. An implied private right of action for direct discrimination was recognized by this Court in *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717, 99 S. Ct. 1946, 1968 (1979). This implied remedy was later extended to include monetary damage remedies in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 77, 112 S. Ct. 1028, 1039, (1992). This Court has not, however, similarly extended the

2. The Respondent argued below that the allegedly adverse employment actions did not rise to the level necessary to constitute actionable retaliation, but, because this case was decided on a motion to dismiss, the Eleventh Circuit assumed, arguendo, that the Respondent retaliated against the Petitioner for complaining about perceived violations of Title IX. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1335 (11th Cir. 2002).

statute to create an implied remedy for retaliation against one who is not a direct victim of gender discrimination. To support his request for relief, the Petitioner claims that this implied right of action for retaliation arises under §§ 901 and 902 of Title IX and 34 C.F.R. § 100.7(e). For the reasons set forth below, this claim may not stand.

The Court should decline the Petitioner's invitation to expand private remedies because *Sandoval* is dispositive here, and it dictates tha Title IX contains no implied private right of action for retaliation. Specifically, *Sandoval* held that there was no implied private right of action for disparate impact discrimination under Title VI of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000d, 2000d-1.[3] Section 601 of Title VI, which is parallel to § 901 of Title IX, prohibits discrimination on the basis of race and national origin in federally funded programs. Section 601 had previously been interpreted as limited to intentional discrimination, but regulations issued under § 602 purported to prohibit disparate impact discrimination. *Sandoval* held that administrative regulations (i) could not expan d the scope of the statutory prohibition, (ii) could not create a right or remedy that Congress had not intended to create, and (iii) could not prohibit acts (disparate impact discrimination) permitted by the statute. *Sandoval*, 532 U.S. at 284-91, 121 S. Ct. at 1518-22.

By analogy, *Sandoval* established that Title IX, the statutory twin of Title VI, did not create an implied private right of action that exceeds the scope of the express statutory

3. Title VI was found to be the model for Title IX, *Sandoval*, 532 U.S. at 280, 121 S. Ct. at 1516. *See Cannon*, 441 U.S. at 704, 99 S. Ct. at 1961.

right. *Sandoval* held that legislative intent is the *only* proper basis to infer a private right of action. This Court explained:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Sandoval, 532 U.S. at 286-87, 121 S. Ct. at 1519-1520.

This Court further explained that the sources for determining legislative intent are normally limited to the text of the statute and the statutory structure. *Sandoval*, 532 U.S. at 287-88, 121 S. Ct. at 1520-21. Here, Title IX dictates that there is no implied remedy for retaliation because retaliation is not mentioned in the text of the statute and cannot be fairly inferred from the text. Reinforcing that conclusion is the fact that Title IX identifies the class for whose benefit the statute was enacted. This class is limited to those individuals subjected to *direct gender discrimination*. (emphasis added). Nowhere in the text of the statute is there even a hint that alleged victims of retaliation, such as the Petitioner, are also protected. The statutory structure of Title IX also militates against further expansion of private rights of action because it already contains an express administrative remedy. This suggests that Congress intended to preclude other remedies.

In the decision below, the Eleventh Circuit followed the lead of *Sandoval* to find that it could rely exclusively on the text and structure of Title IX to reject the Petitioner's claim for an implied right of action for retaliation by one who is not a direct victim of gender discrimination. *Jackson*, 309 F.3d at 1345-46. The Eleventh Circuit concluded that secondary sources of legislative intent were not necessary because Congressional intent is clear from the text and structure of Title IX.

B. Congress Did Not Intend To Create An Implied Private Right of Action for Retaliation Under Title IX

1. The Text of § 901 Belies Any Intent to Create An Implied Private Right of Action For Retaliation

The analysis in this case can also begin and end with the text of the statute. Section 901, the only section that creates any private rights, does not prohibit retaliation for opposing gender discrimination. Section 901 provides, in pertinent part that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). Clearly, this section says nothing about retaliation. Instead it applies only to persons who are discriminated against on the basis of sex. The Petitioner was not discriminated against on the basis of sex, nor does he claim that he was.[4] Petition at 3; 9 n.1; *Jackson*, 309 F.3d at 1335.

4. That fact distinguishes this case from most of the cases cited by the Petitioner where a student claims both direct discrimination and retaliation for complaining about the original discrimination. *See infra*, footnote 7.

Rather, his sole claim is that he was subjected to retaliation for complaining about alleged discrimination against members of the girls' basketball team.

Because Congressional intent is the only permissible basis for creating implied private rights, the definition of rights covered in § 901 is of paramount importance. Although this Court has interpreted § 901 to include implied rights and remedies, it has been careful not to extend the scope of those rights beyond the discrimination prohibited in the text of the statute. The Court has not gone far afield to create additional rights or additional classes of beneficiaries not described in the statute itself. This Court has held that the definition of discrimination is broad enough to encompass sexual harassment, but only to the extent that sexual harassment discriminates against individuals, or excludes them from participation on the basis of sex. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 112 S. Ct. 1028 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989 (1998); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661 (1999). This Court noted in *Davis* that

> The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. . . . It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines

> and detracts from the victims' educational experience, that the victim-students are **effectively denied equal access** to an institution's resources and opportunities.

Davis, 526 U.S. at 650-51, 119 S. Ct. at 1675 (emphasis added). The care which this Court took in *Davis* to cast sexual harassment as just another form of gender discrimination, clearly shows that any implied private right must still fit within the terms of the statute. Therefore, *Davis* dictates a cautious approach to implied rights and does not justify judicial creation of the broad right against retaliation sought by the Petitioner. A broad prohibition against retaliation would exceed the scope of the statute and result in judicial creation of a right that Congress did not intend. The role of the judiciary is to interpret the rights which Congress intended to create, not to create new rights. This is the case no matter how desirable the result or how consistent with the policy goals of the statute.[5]

As noted by the Eleventh Circuit in the decision below, the text of § 901 does not prohibit retaliation or imply any such prohibition. Therefore, the Eleventh Circuit refused to create a new right and construed its task as merely,

> to interpret what Congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of

5. *Gebser* also noted that the quasi-contractual nature of Title IX militates against private damage remedies unless the fund recipient had actual notice of the harassment and failed to respond reasonably. *Id.*, 524 U.S. at 287, 118 S. Ct. at 1998. Similarly, that factor militates against expansion to cover retaliation that is not expressly prohibited by the text of the statute.

> retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct.

Jackson, 309 F.3d at 1344-45. This conclusion is reinforced by the contrast between Title IX and Title VII, which contains an express prohibition against retaliation. 42 U.S.C. § 2000e-3(a). Clearly Congress knew how to prohibit retaliation when it so chose, militating against an implied prohibition.[6] It may be safely assumed, therefore, that Congress chose not to create a similar prohibition against retaliation in Title IX.

2. The Structure of Title IX and the Existence of an Express Administrative Remedy Militate Against an Implied Private Remedy

The structure of Title IX also weighs against an implied remedy for retaliation. That is, the statute already contains an express administrative remedy. The Department of Education may enforce the provisions of Title IX through an administrative process that culminates in a complete denial of federal funds to an entity in violation of Title IX. This structure suggests that Congress – by providing an express remedy – meant to preclude other remedies not specifically listed. Even though some implied remedies have been recognized, the structure of Title IX and its express administrative remedies caution against any further expansion of implied remedies.

6. Unlike "sexual harassment," "retaliation" is not a subset of discrimination, a point made clear by the fact that Title VII contains specific language defining discrimination to include retaliation. No such language exists in Title IX.

In sum, the text of § 901 and the structure of Title IX clearly establish that Congress did not intend to create a private right of action for retaliation. The *Sandoval* analysis compels the conclusion that no basis exists for the courts to create an implied right of action for retaliation, and the decision below is correct.

3. *Peters v. Jenney* Was Incorrectly Decided and Does Not Support the Existence of an Implied Remedy For Retaliation

The Petitioner cites to a recent Fourth Circuit case, *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), for the proposition that there is an implied right against retaliation.[7]

7. Despite suggestions of "near-consensus in the federal circuit courts," there are really only three cases – this case, *Peters*, and *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997), a Fifth Circuit decision prior to *Sandoval* – that have squarely addressed whether Title IX created an implied private right of action for retaliation against someone other than the victim of gender discrimination. The other cases cited by the Petitioner are of marginal relevance because they contain no detailed analysis to support an implied right of action and because they ultimately reject the retaliation claims at issue.

Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 251 (2d Cir. 1995) was decided prior to *Sandoval* and involved a retaliation claim by a dental student who also claimed to be a direct victim of sexual harassment. The opinion assumed that there was a cognizable claim for retaliation, but did not cite any authority for that position, or perform any analysis on the threshold question. It affirmed a dismissal of all claims, including direct discrimination and retaliation.

Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 67 (1st Cir. 2002), also involved a student who asserted claims for direct discrimination (Cont'd)

Peters, which was a Title VI case, does not establish such an implied right, paid only lip service to the *Sandoval* analysis. *Peters* did not deeply analyze whether Congress intended to create an implied right against retaliation, but focused primarily on 34 C.F.R. § 100.7(e) as an interpretative regulation that somehow defined "retaliation" as an implicit component of prohibited discrimination. As will be discussed below, that regulation is not an interpretative regulation and cannot validly expand the scope of the statute. *Peters* also relied heavily on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969), for the proposition that retaliation is implicit in civil rights statutes.[8] Significantly, *Peters* was decided after the Eleventh Circuit's opinion in this case, but the majority opinion discusses *Jackson* only in a single footnote. *Peters*, 327 F.3d at 318, n.10. The dissent in *Peters* does, however, discuss *Jackson* in detail and concludes that the Eleventh Circuit was correct in rejecting an implied right of action for retaliation. *Peters*, 327 F.3d at 324-28 (dissent).

The Petitioner seeks to limit *Sandoval* to disparate impact cases, Petition at 10, but fails to acknowledge its more fundamental holdings that (i) the intent of Congress is the

(Cont'd)
and retaliation. That court assumed, also without analysis or citation to authority, that a Title IX retaliation claim involved the same elements as a Title VII retaliation claim. This opinion ultimately affirmed dismissal on the basis that the complaint did not allege facts sufficient to support either the retaliation claim under Title IX or the direct discrimination claim.

8. As discussed in Section I.C. below, *Sullivan* does not establish that there is a generalized implied right to be free of retaliation under Title IX.

primary desideratum for analyzing implied rights and remedies and (ii) the federal courts should be reluctant to speak where Congress has been silent. *Sandoval*, 532 U.S. at 287-91, 121 S. Ct. at 1520-22. The Petitioner, however, sees the central focus of *Sandoval* as being the effect of authoritative interpretative regulations. Petition at 11. This is incorrect, because, as this Court held in *Sandoval*, such regulations may interpret a statute, but cannot create rights which Congress did not create. As this Court stated in *Sandoval*, "we have found no evidence anywhere in the text [of § 602] to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522.

C. A Prohibition Against Retaliation is Not Implicit in Civil Rights Statutes Generally

The Petitioner argues that he is entitled to an implied private remedy because anti-retaliation is implicit in civil rights statutes. Petition at 12-15. This argument fails because it does not give effect to Congressional intent or to this Court's current approach to the creation of implied private rights of action. The Petitioner relies principally on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969), for this argument, but his argument fails.

Sullivan allowed a private cause of action for retaliation under 42 U.S.C. § 1982. The Petitioner claims that *Sullivan* establishes that anti-retaliation prohibitions are generally included by implication in civil rights statutes. However, *Sullivan* is not able to bear the load that Petitioner places on it. First, the argument from *Sullivan*, as advanced by the Petitioner, conflicts with *Sandoval*, which made clear that implied rights and remedies can be recognized only if Congress so intended. *Sandoval* specifically noted that the

previous, liberal understanding of private rights of action was abandoned in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080 (1975). *Sandoval*, 532 U.S. at 287, 121 S. Ct. at 1520. Thus, cases under the "*ancien regime*" have been abandoned and should be approached with caution to the extent that they conflict with *Sandoval* and *Cort v. Ash Sullivan* has not been overruled, but *Sandoval* requires that it be limited to its facts.[9] Second, *Sullivan* is distinguishable from this case because the plaintiff there did more than merely complain about discrimination that happened to others. He was a party to a lease transaction that was subject to illegal discrimination. *Sullivan*, 396 U.S. at 235, 90 S. Ct. at 403. Although he was himself a white man, his attempted lease of property to a black man lead to his expulsion from the neighborhood board. *Id.* Arguably, he fell within the class of intended beneficiaries of a statute that granted to all citizens the same rights to transact property "as is enjoyed by white citizens." *Sullivan*, 396 U.S. at 235, 90 S. Ct. at 404. In contrast, the Petitioner here did not himself suffer any direct discrimination or exclusion on the basis of sex. Rather, his only claim is that he was retaliated against for complaining about perceived discrimination against others. Thus, *Sullivan* is distinguishable on its facts and does not support an implied right of action for retaliation under Title IX.

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9. It is not clear to what extent *Sullivan* survived *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), which held that 42 U.S.C. § 1981 covered only discrimination in the making and enforcement of contracts and not racial harassment during the employment relationship. *Patterson* was overruled by statute, but this Court later held that the amendment was not retroactive, implicitly rejecting arguments that § 1981 should have been broadly construed from the outset. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510 (1994). Neither *Patterson* nor *Rivers* discussed *Sullivan*, but their holdings caution against an expansive reading of that case.

D. *Sandoval* Establishes that an Administrative Regulation May Not Create a Federal Right Unless Such a Right is Expressly Created by the Governing Statute

The Petitioner also claims that administrative regulations create a right to be free from retaliation. Petition at 16-21. That is not correct and, in fact, is contrary to the holding of *Sandoval*. Although administrative regulations can interpret ambiguous statutes or fill in the gaps, they cannot create rights that Congress did not intend to create. *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522. To be certain, § 902, which authorized administrative regulations under Title IX, does not create additional rights, as evidenced by the Eleventh Circuit's application of *Sandoval*. Significantly, the Eleventh Circuit held that § 902 neither prohibited retaliation, nor authorized administrative regulations that prohibit retaliation. The Eleventh Circuit noted that:

> Section 902, like its twin § 602, is devoid of "rights-creating" language of any kind – whether against gender discrimination, retaliation, or any other kind of harm. Instead, again like § 602, it explicitly directs and authorizes *federal agencies* to regulate recipients of federal funding to effectuate the anti-discrimination provisions of § 901. As detailed above, *see supra* at 1336- 37, it provides an enforcement mechanism – the cessation of federal funding – and imposes "elaborate restrictions on agency enforcement." *Sandoval*, 532 U.S. at 290, 121 S. Ct. at 1521. . . . That § 902 is thus concerned exclusively with the power of federal agencies to regulate recipients of federal funds renders its focus, like § 602's, "twice removed" from any consideration of what harm Title IX is meant to remedy. *Sandoval*, 532 U.S. at 289, 121 S. Ct. at 1521. Section 902 plainly does not disclose any congressional intent to imply a private right of action of any kind, let alone against retaliation.

Jackson, 309 F.3d at 1345.

Thus, the anti-retaliation provision proposed by the Petitioner is not twice, but thrice, removed from the rights created under § 901. The regulations do not focus on the victim, or the funding recipient, or even the administrative agency issuing the regulations. Instead, § 902 focuses solely on the enforcement of the statute and does not create additional rights or authorize administrative regulations to create additional rights. As it stands, the connection between the regulations and implied rights is simply too attenuated to support any private damage remedy under Title IX.

The text of § 902 should conclusively establish that it does not authorize regulations which attempt to create any private remedies, for retaliation or anything else. If, however, there is any doubt on that point, *Sandoval* holds that such a regulation *cannot* create a private right of action that Congress did not. *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522. As this Court stated in *Sandoval*, it is "incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.* This holding is consistent with *Gebser*, in which this Court held that there was no private right of action for violation of a Department of Education regulation requiring schools to adopt and publish sexual harassment policies and

grievance procedures. *Gebser*, 524 U.S. at 292, 118 S. Ct. at 2000. This Court concluded in *Gebser* that "[w]e have never held . . . that the implied right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements." *Id.*

Thus, regulations alone cannot support a private right of action. They are relevant only to the extent that they *interpret* the statute by defining and clarifying both permissible and prohibited conduct under the same. The source of any right remains properly rooted in the statute itself, and not in the administrative regulations that interpret it. Accordingly, *Sandoval* declared that the disparate impact regulations under § 602 went beyond what Congress expressly created in § 601 and attempted instead to create new rights. The text of § 601 does *not* prohibit disparate impact discrimination while the regulations under § 602 purport to do just that. Thus, this Court reasoned in *Sandoval* that administrative regulations cannot support private causes of action to prohibit the very conduct that the governing statute permits. The reach of administrative regulations cannot exceed the scope of the statute.

Similarly, the administrative regulations at issue here, 34 C.F.R. § 100.7(e), cannot create a private right against retaliation. The statute does not prohibit, or even address, retaliation against one who is not a direct victim of discrimination on the basis of sex. Like disparate impact discrimination in *Sandoval*, retaliation is not prohibited by the statute and is therefore permitted. Accordingly, administrative regulations can neither prohibit retaliation nor create a right that Congress did not create.

Nor can a right against retaliation arise from a claim that 34 C.F.R. § 100.7(e) is an "authoritative interpretation of the statute" that is entitled to deference under *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 104 S. Ct. 2778, 2781-82 (1984). By its language and structure, the regulation does not purport to define terms, fill gaps or clarify ambiguities. Instead, it seeks only to provide a procedure for investigations by the Department of Education. It provides:

> (e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

34 C.F.R. § 100.7(e).

There is nothing in the language of this regulation to even suggest that it is defining or interpreting "discrimination" or other ambiguous terms contained in § 901.[10] To the extent that this regulation has any relevance

10. *See Sandoval*, 532 U.S. at 284-85, 121 S. Ct. at 1518-19, for a discussion of cases affirming "interpretative regulations." Almost all of those cases describe the regulations at issue as "defining (Cont'd)

outside the context of the Department of Education investigations, it purports to create a new right out of whole cloth, which is precluded by *Sandoval*.

The structure of this regulation ties it to the enforcement of the statute and not to any expansion of implied private rights. This regulation is contained in § 100.7, entitled "Conduct of Investigations." It relates entirely to the conduct of periodic compliance reviews and investigations by the Department of Education under § 902. Although the Court need not reach the issue, it appears that the anti-retaliation provision is limited to retaliation in connection with a Department of Education investigation, not retaliation for complaints in general.

The Petitioner also errs in attempting to buttress his expansive new implied right by reliance on legislative history, post-enactment history, and Congressional failure to disapprove of the regulations. Petition at 16-19. As this Court has already determined in *Sandoval*, legislative history is not helpful in determining whether there is a private right of action under Title VI and Title IX. *Sandoval*, 532 U.S. at 292, 121 S. Ct. at 1523. Similarly, the Petitioner cannot rely on an argument that Congressional failure to disapprove these administrative regulations somehow supports an implied private right. Congressional silence is weak even when Congress enacts amendments after a judicial interpretation. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-87, 114 S. Ct. 1439, 1453 (1994). The Petitioner's support here is even weaker because

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(Cont'd)
terms" or "clarifying" what was covered. In contrast, the regulations at issue here do not clarify or define anything, but purport to prohibit an action not covered by the statute.

all he can point to is Congressional failure to disapprove regulations. Moreover, Congressional failure to disapprove these regulations says nothing about whether Congress approved of an implied right of action for retaliation. The regulations were submitted for review in 1975, prior to the time that *Cannon* first recognized an implied private right of action and almost two decades before *Franklin* extended the implied right of action to include monetary damages. Thus, there is no evidence that Congress even thought about implied remedies in 1975 and the post-enactment legislative history is simply not relevant or instructive.

The Petitioner argues at length about why an anti-retaliation policy is consistent with the goals of Title IX and why this would constitute sound public policy. Petition at 15-19. Those arguments are foreclosed by *Sandoval* and are properly addressed to Congress, which has the power to prohibit retaliation if it so chooses. To the extent, however, that policy reasons are in any way relevant, it should be noted that an anti-retaliation policy is not cost free. A liberal anti-retaliation policy could easily serve to federalize educational policy disputes, especially those concerning the allocation of scarce resources. *See Peters*, 327 F.3d at 320, n.16 ("manifest desire not to tie the hands of employers in the objective selection and control of personnel"). Creating a new right against retaliation could usurp tenure laws and Title VII remedies and could alter the balance of employer-employee relations. Thus, bringing disputes about allocation of facilities and equipment into federal court under an anti-retaliation rubric would serve only to divert scarce resources away from the educational mission. *See Gebser*, 524 U.S. at 289, 118 S. Ct. at 1999.

Finally, affirmance of the decision below will not leave the goals of Title IX defenseless. The Department of Education retains its authority to investigate and remedy violations ranging from informal actions to a cutoff of all federal funds. Moreover, the students on the girls' basketball team have a right to file a suit under Title IX if they believe that the boys' teams have better facilities and equipment. Finally, the Petitioner can avail himself of any rights he has under state tenure laws and under 42 U.S.C. § 1983 if his First Amendment rights have been violated.

II. THE DECISION BELOW IS CORRECT BECAUSE THE PETITIONER IS NOT WITHIN THE CLASS OF INTENDED BENEFICIARIES

The Eleventh Circuit also held that, even if there is an implied private right of action for retaliation, the Petitioner is not within the class of intended beneficiaries. Section 901 identifies its beneficiaries as the class of persons subjected to discrimination or exclusion on the basis of gender. Nothing in the statute suggests that it also benefits others indirectly affected by discrimination, including parents, teachers, or coaches. Congress could have expanded the class of intended beneficiaries, but chose not to do so. Therefore, the judiciary is not free to expand the scope of the rights and remedies beyond what Congress intended. *See Gebser*, 524 U.S. at 289, 118 S. Ct. at 1999 ("anomalous to expand the plaintiff class for implied causes of action beyond the bounds of the express cause of action").

As the Eleventh Circuit concluded in the decision below, § 901 provides a private right of action to a limited class of identified victims of gender discrimination.

> Nowhere in the text, however is any mention made of individuals other than victims of gender discrimination. . . . We are not free to extend the scope of Title IX's protection beyond the boundaries Congress meant to establish, and we thus may not read Title IX so broadly as to cover anyone other than direct victims of gender discrimination.

Jackson, 309 F.3d at 1346-47. The Petitioner is not a member of the protected class because he has suffered no discrimination or exclusion on the basis of sex. Therefore, his retaliation claim must fail.[11]

CONCLUSION

As evident from the discussion above, as well as the decision below, the Eleventh Circuit correctly held that Title IX contains no implied private right of action for retaliation. The statute itself contains no express private remedy of any kind anywhere in its text. Absent evidence of Congressional intent to create such a remedy, this Court should not constrain to create the same. Consequently, the law in this matter is clear: inasmuch as Title IX contains no reference to retaliation, any implied private remedy for retaliation is, therefore, precluded.

This Court advanced the same clarity in its decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), wherein it held that Congressional intent is the key to implied private rights and remedies, and that this intent could only be ascertained from the text and structure of the statute.

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11. The dissent in *Peters* found the Petitioner to be "at least twice removed from the class of people sought to be protected by the statute."

The Eleventh Circuit merely adhered to this Court's reasoning from *Alexander v. Sandoval* in denying the Plaintiff's Title IX claims against the Board insofar as Title IX simply did not permit the type of relief the Plaintiff sought. Thus, as it relates to this Court and the Eleventh Circuit, there is no genuine split of authority on the issue of implied private rights and remedies under Title VI or Title IX, regardless of what the administrative regulations, or the Plaintiff, attempt to create.

In sum, this Court should deny the Petition for Certiorari because the Eleventh Circuit's decision was correct. The text and structure of Title IX clearly does not support an implied private right of action for retaliation.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent's brief in opposition does nothing more than argue the merits of the case and defend the correctness of the opinion below. Even on its own terms, respondent's argument is flawed. But more important, it is an argument addressed to the merits, not a reason for denying certiorari.

On the issue of certiorari, respondent's brief only confirms the need for review by this Court. Respondent concedes that there is a square conflict between the holding below and those of every other circuit court to consider the question presented – a question of federal statutory construction that is critical to assuring full protection against sex dis-

crimination in education. The Court should grant certiorari and resolve this issue now.

I. RESPONDENT'S BRIEF CONFIRMS THE EXISTENCE OF A CONFLICT IN THE COURTS OF APPEALS ON AN IMPORTANT ISSUE OF STATUTORY INTERPRETATION.

Petitioner's chief argument for certiorari is that the decision below conflicts with those of other courts of appeals. Pet. at 8-10. Respondent does nothing to rebut this contention. Instead, the Board concedes the existence of a conflict and argues only that decisions from other courts of appeals are wrongly decided. Opp. at 10-12. Petitioner, of course, takes a different view of the merits. But for present purposes, the important point is that petitioner and respondent *agree* that the circuits are divided as to whether Title IX's private right of action extends to claims of reprisal discrimination.

Respondent concedes expressly that at least three courts of appeals (the Eleventh, Fifth, and Fourth Circuits) have squarely addressed the issue presented in this case – and reached differing conclusions. Opp. at 10 n.7. By itself, that would be grounds for granting certiorari. But the split is deeper than that. Respondent does not (and could not) dispute that the decisions of two other courts of appeals – the Second Circuit in *Murray v. New York University College of Dentistry*, 57 F.3d 243 (1995), and the First Circuit in *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 67 (2002) – also are in conflict with the decision below. Pet. at 9.

Respondent does argue that *Murray* and *Frazier* are of only "marginal relevance," because they lack "detailed analysis" and ultimately reject retaliation claims on other grounds. Opp. at 10 n.7. Neither of those distinctions has any bearing on whether certiorari is warranted. The crucial issue here is the conflicting legal *standards* applied in different circuits, not the level of detail employed or the outcomes achieved on particular facts. The legal standard that governs in the First and Second Circuits – that a cause of action exists for reprisal discrimination – differs from that established by the Eleventh – and applied to the facts of *this* case, it would lead to a different result.

At bottom, respondent's position on the circuit split identified in the petition is that the cases in conflict with the decision below – and especially the Fourth Circuit's decision in *Peters v. Jenney*, 327 F.3d 307 (2003) – are wrongly decided. Opp. at 10. That is no answer to the argument for certiorari. In fact, for all the reasons discussed in the petition, the analysis in *Peters* and cases like it is entirely correct. Pet. at 11-12. But quite apart from the ultimate merits of the issue, this Court should grant certiorari rather than allow the lower courts to stand in acknowledged disagreement on this important issue of federal law.

II. RESPONDENT'S MERITS ARGUMENTS MISAPPREHEND THE NATURE OF THE QUESTION PRESENTED.

Respondent's merits arguments are not only misplaced but also misconceived in important respects. At various points in its brief, respondent misconstrues both the argument advanced in the petition and the parameters of the question presented. To the extent that this confusion is derived from the mistaken analysis of the court below, it is an additional reason to grant review and clarify the law in this area.

1. Much of respondent's brief is addressed to the wrong question. This is not a case about whether Title IX creates a private right of action, a question definitively resolved by the Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Instead, it is a case about the substantive guarantees of Title IX: whether Title IX prohibits retaliation, so that

retaliation claims are encompassed within the cause of action recognized in *Cannon*. Pet. at 2.

Many of respondent's arguments fail to appreciate this critical distinction, and thus fall wide of the mark. Respondent argues, for instance, that the structure of Title IX and the statute's express administrative remedy "militate against an implied private remedy." Opp. at 9. But arguments about the existence of a private right of action under Title IX are foreclosed by *Cannon* and beside the point here. Similarly, respondent's view that *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), has been called into question by both *Cort v. Ash*, 422 U.S. 66 (1975), and *Alexander v. Sandoval*, 532 U.S. 275 (2001), Opp. at 12-13, rests on a misunderstanding of the issue presented. *Sullivan* is important here not because it identifies a private cause of action under § 1982; that issue is settled already with respect to Title IX. It is important because the Court construes § 1982's broad anti-discrimination mandate to include a prohibition on retaliation – a holding about the substantive content of § 1982 that is neither undermined by, nor even related to, the Court's later decisions in *Cort v. Ash* and *Sandoval*.

In short, respondent's arguments miss the point. The actual question in this case – as respondent itself recognizes elsewhere in its brief – is whether Title IX prohibits retaliation or whether, as respondent would have it, "retaliation is not prohibited by the statute and is therefore permitted." Opp. at 16.

2. Throughout its brief, respondent asserts that petitioner – as well as the Fourth Circuit in *Peters* – is arguing that a private cause of action arises solely from relevant administrative regulations. *See, e.g.*, Opp. at 4, 11, 12, 14. That is not petitioner's position, and it is not the position adopted in *Peters*.

As explained in the petition, the right of action in question arises not because retaliation is prohibited by a Department of Education regulation, but because it is prohibited by Title IX. Pet. at 10-12. The anti-retaliation regulation is relevant because it sheds light on congressional intent and validly construes Title IX. *Id.* at 10-12, 19-21; *Sandoval*, 532 U.S. at 284 (cause of action for conduct prohibited expressly by statute or by regulations that "authoritatively construe" statute); *cf. Peters*, 327 F.3d at 315, 319 (applying *Sandoval*). But the ultimate question, as noted just above, is whether *Title IX itself* prohibits retaliation. Nothing in petitioner's brief suggests otherwise. It is respondent, not petitioner, that sometimes loses sight of the point.[1]

3. Contrary to respondent's oblique suggestions, Opp. at 6 n.4, 10 n.7, no legal significance attaches to the fact that petitioner in this case is a man who was not the target of what the Eleventh Circuit calls "direct" gender discrimination. Petitioner's status does not distinguish this case from other Title IX cases, nor narrow the scope of the question presented.

As respondent itself appears to understand,[2] the decision below does not rest on the particular facts of the case. The holding of the Eleventh Circuit is that Title IX does not

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[1] Respondent's unconvincing parsing of the anti-retaliation regulation, Opp. at 17-18, for instance, is largely beside the point. Even if it were true that the regulation did not by its terms prohibit retaliation, that would not resolve the issue of whether retaliation is barred by Title IX. In any event, it is difficult to imagine a regulation that more clearly prohibits retaliation than one that begins: "Intimidatory or retaliatory acts prohibited." 34 C.F.R. § 100.7(e).

[2] The first twenty pages of respondent's twenty-one page brief are devoted to defending the Eleventh Circuit's holding that Title IX does not prohibit retaliation against anyone. Only then does the brief note that the Eleventh Circuit "also held" that any cause of action for retaliation would not extend to men like petitioner. Opp. at 20.

"prevent or redress retaliation" at all. App. 22a; Pet. at 6. Only after reaching that conclusion does the court go on to identify petitioner's status as a male coach protesting discrimination against the girls on his high school basketball team as grounds for denying relief even if retaliation were otherwise prohibited. App. 23a.

Nor are we aware of any other reported Title IX retaliation case that turns on whether the claimant had protested discrimination against him or herself as opposed to discrimination against others. That is not surprising. None of the major civil rights statutes that expressly bars retaliation draws any such distinction, either; instead, Congress has protected those who complain of discrimination against others as fully as those who protest discrimination against themselves. *See, e.g.*, 42 U.S.C. § 2000e-3(a)(2000) (Title VII); *Hazel v. U.S. Postmaster Gen.*, 7 F.3d 1, 3 (1st Cir. 1993) (describing broad retaliation provision of Title VII).[3] Congress – like this Court, *see Sullivan*, 396 U.S. at 237; Pet. at 13 – recognizes that statutory equality rights cannot be fully vindicated unless *all* persons who complain of discrimination in violation of a statute are protected against retaliation. There is no reason to think that Congress would have wanted some lesser standard to protect the rights guaranteed by Title IX.

[3] Other examples of civil rights statutes with anti-retaliation provisions, all of which expressly apply to those who complain about discrimination against others, are the Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b) (2000); the Age Discrimination in Employment Act, 29 U.S.C. § 623(d); and the Family and Medical Leave Act, 29 U.S.C. § 2615(a) (2000). The lower courts have also interpreted the anti-retaliation provision of the Fair Labor Standards Act to apply to all who oppose activity in violation of the statute, whether on their own behalf or on behalf of others. *See, e.g.*, *Lambert v. Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc); *EEOC v. Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. 1992); *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989).

Indeed, as this case well illustrates, protection of those who protest discrimination against others may be especially critical to enforcement of Title IX rights. Many of the persons protected by Title IX are students and minors, often poorly situated to raise complaints and force compliance with statutory requirements. Adult employees of schools, on the other hand, are far better positioned both to identify potential Title IX violations and to bring them to the attention of school administrators in a way that will result in voluntary compliance. Unless coaches acting on behalf of their student athletes are protected against retaliation, one of the most effective means of Title IX enforcement will be foreclosed.

Thus, the fact that petitioner in this case complained of gender discrimination directed against members of the girls' basketball team rather than gender discrimination directed against himself is of no legal import. The question in this case is simply whether Title IX prohibits retaliation, against petitioner or anyone else.

* * *

Respondent has conceded that the holding of the court below directly conflicts with those of a number of other courts of appeals. Given the great significance of that holding – which undermines the rights of every American protected against discrimination by Title IX – the Court should grant certiorari without delay. This case, in which the issue is cleanly and directly presented, is the perfect opportunity for it to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 02-1672

In the Supreme Court of the United States

RODERICK JACKSON, PETITIONER

v.

BIRMINGHAM BOARD OF EDUCATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. The position of the United States is that the petition for a writ of certiorari should be granted.

STATEMENT

Petitioner Roderick Jackson, a teacher, filed suit against respondent Birmingham Board of Education alleging that respondent retaliated against him because he had complained about sex discrimination in the school's athletic program. Petitioner alleged that such retaliation violates Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The district court dismissed petitioner's complaint for failure to state a claim, holding that Title IX does not prohibit retaliation. The court of appeals agreed that Title IX does not

prohibit retaliation and affirmed the district court's judgment of dismissal.

1. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Title IX is modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race in federally assisted programs. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 694 (1979).

Section 902 of Title IX authorizes federal agencies that provide federal financial assistance "to effectuate" Title IX "by issuing rules, regulations, or orders of general applicability," and to enforce such regulations administratively. 20 U.S.C. 1682. Pursuant to that directive, the Department of Education adopted a regulation addressing retaliation that was originally issued to enforce Title VI. See 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)). The regulation is entitled "*[i]ntimidatory or retaliatory acts prohibited*" and provides that:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. 100.7(e).

2. In 1993, respondent hired petitioner as a physical education teacher and coach for the girls' basketball team. Pet. App. 3a. During his coaching tenure, petitioner came to believe that respondent was not

providing the girls' basketball team with equal funding or equal access to sports facilities and equipment. *Ibid.* After petitioner complained to his supervisors about the treatment of the girls' basketball team, he began to receive negative evaluations. *Ibid.* In May 2001, respondent relieved petitioner of his coaching duties. *Ibid.* Respondent still employs petitioner as a teacher, but petitioner no longer receives the supplemental pay he received for coaching. *Id.* at 3a, 29a & n.1.

Petitioner filed suit against respondent in federal district court, alleging that respondent retaliated against him, in violation of Title IX. Pet. App. 29a. The district court dismissed petitioner's complaint, holding that Title IX does not create a private cause of action for retaliation. *Id.* at 27a.

The court of appeals affirmed. Pet. App. 1a-26a. The court first held that, while the text of Section 901 (20 U.S.C. 1681) protects individuals in federally assisted programs from discrimination on the basis of sex, it does not create a private right of action for retaliation. Pet. App. 19a-20a. The court reasoned that "[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations," and "[i]ndeed, the statute makes no mention of retaliation at all." *Id.* at 20a.

The court next held that Section 902 (20 U.S.C. 1682) does not create a private cause of action for retaliation either. Pet. App. 20a-21a. The court reasoned that Section 902 is "devoid of 'rights-creating' language of any kind—whether against gender discrimination, retaliation, or any other kind of harm," and instead "directs and authorizes *federal agencies* to regulate recipients of federal funding." *Id.* at 21a. The court also concluded that Section 902's provision for administrative enforcement "strongly counsels against inferring a private

right of action against retaliation, because '[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Ibid.* (quoting *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001)).

The court of appeals acknowledged that a Department of Education regulation expressly protects individuals from retaliation, but it held that the regulation does not create a private cause of action for retaliation. Pet. App. 22a. Relying on this Court's decision in *Sandoval*, 532 U.S. at 291, the court reasoned that an agency may not afford a private right of action through regulation when Congress has not done so in the statute itself. Pet. App. 22a.

Finally, the court held that even if Title IX prohibits retaliation, petitioner would not be within the class of persons protected by that prohibition. Pet. App. 23a-24a. In the court's view, the statute only protects "direct victims of gender discrimination," and not persons "who care for, instruct, or are affiliated with" the direct victims. *Ibid.*

DISCUSSION

The court of appeals' holding that Title IX does not forbid retaliation is incorrect; it conflicts with the Fourth Circuit's decisions in *Peters* v. *Jenney*, 327 F.3d 307 (2003), and *Litman* v. *George Mason Univ.*, No. 01-2128, 2004 WL 345758 (Feb. 25, 2004); and it raises an issue of recurring importance. The petition for a writ of certiorari should therefore be granted.

A. The Court Of Appeals Erred In Holding That Title IX Does Not Prohibit Retaliation

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected

to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Title IX does not expressly authorize a private suit to enforce its prohibition. In *Cannon* v. *University of Chicago*, 441 U.S. 677, 691-693 (1979), however, the Court held that Title IX's rights-creating language reflects a congressional intent to authorize private enforcement. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that Title IX authorizes private parties to seek damages for intentional violations of Title IX. Subsequent decisions have reaffirmed that Title IX authorizes private suits for damages for intentional violations of the statute. *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

The court of appeals in this case held that a retaliation victim may not maintain a private cause of action for damages under Title IX because such retaliation can never violate the terms of the statute. The court reasoned that "[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations," and "[i]ndeed, the statute makes no mention of retaliation at all." Pet. App. 20a. That analysis is flawed.

1. First, Title IX's text prohibits "discrimination" against any person "on the basis of sex," regardless of the form that the discrimination takes. When a recipient purposefully retaliates against an individual *because* that individual has complained *about intentional sex discrimination*, as opposed to some other matter, the recipient can readily be viewed as having subjected that person to "discrimination" "on the basis of sex." Because that form of retaliation falls within Title IX's general terms, Title IX's failure to refer specifically to

retaliation is not controlling. Just as Title IX's broad prohibition against intentional discrimination covers other forms of intentional discrimination to which the statute does not specifically refer (*e.g.*, sexual harassment), it covers intentionally discriminatory retaliation.

That does not mean that a general nondiscrimination provision invariably encompasses a prohibition against discriminatory retaliation. Other relevant indicators of statutory intent could show that retaliation is categorically excluded from a broad nondiscrimination provision. As explained in Sections 2 and 3, however, the background and purposes of Title IX demonstrate that its prohibition against discrimination on the basis of sex encompasses discriminatory retaliation.

Under Title IX's statutory standard, not every act of retaliation against a person who has complained about sex discrimination violates Title IX. Because Title IX only prohibits actions taken "on the basis of sex," a recipient that indiscriminately retaliates against all complainers as a class would not violate the statute. But when the recipient purposefully retaliates against a complainant because the complaint is about intentional sex discrimination, Title IX's "on the basis of sex" requirement is satisfied.

2. The court of appeals' constricted reading of Title IX not only fails to give full effect to the statutory text, it also fails to take into account the legal background against which Title IX was enacted. Just three years before Title IX was enacted, this Court decided *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Sullivan, a white man, owned two houses, each of which came with a "membership share" that entitled him to use a privately-owned park. Sullivan rented one of the houses to a black man and assigned one of the membership shares to him. The corporation that owned the

park refused to approve the assignment because the lessee was black. When Sullivan protested that action, the corporation expelled him and took away both of his membership shares. Sullivan then sued the corporation, alleging a violation of 42 U.S.C. 1982, which provides that "[a]ll citizens of the United States shall have the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property," and which had previously been construed by this Court to prohibit all "racial discrimination * * * in the sale and rental of property." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

Of critical importance here, the *Sullivan* Court held that Sullivan could maintain an action under Section 1982 not just for being denied the right to complete his transaction with a black person, but for "expulsion for the advocacy of [that person's] cause." 396 U.S. at 237. The Court reasoned that "[i]f that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Ibid.*

Thus, just three years before Title IX was enacted, this Court had construed a prohibition on racial discrimination in the sale or rental of property to cover retaliation against persons who complain about such discrimination. Against that background, Congress would have understood that, by prohibiting sex discrimination in federally funded educational programs, it was simultaneously forbidding recipients from retaliating against persons who complain about that form of discrimination. Congress would have seen no need to enact a prohibition that specifically referred to retalia-

tion. See *Cannon*, 441 U.S. at 696-698 (Congress is presumed to be aware of the law).

3. The court of appeals also failed to interpret the scope of Title IX's private right of action "in light of the purposes Congress sought to serve." *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)). In enacting Title IX, Congress "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Those objectives would be difficult, if not impossible, to achieve if recipients remained free to retaliate against individuals who complain about sex discrimination.

Indeed, before Title IX was enacted, Congress heard substantial evidence that persons had been censured or fired for complaining about sex discrimination at educational institutions.[1] There is no plausible reason that

[1] See *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 91st Cong., 2d Sess. Pt. 1, at 242 (1970) (testimony of Dr. Ann Harris) ("At other educational institutions, women who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for actions such as outright plagiarism."); *id.* at 247 ("Other women have spoken to me privately [about the sex discrimination they experienced], but were reluctant to testify publicly for fear of reprisals."); *id.* at 302 (statement of Bernice Sandler) ("It is also very dangerous for women students or women faculty to openly complain of sex discrimination on their campus. * * * At a recent meeting of professional women I counted at least four women whose contracts were not renewed after it became known that they were active in fighting sex discrimination at their respective institutions."); *id.* at 463 (testimony of Daisy Fields) ("few women have dared to file complaints of sex discrimination" because "[w]e know of a number of such cases" in which "women who have filed complaints have suffered reprisals in the form of having their jobs abolished" or "have been reassigned to some degrading position far below their capabilities in anticipation they might resign"); *id.* at 588 (statement of Women's Rights Commission of New York University Law School) ("It was recently discovered that one woman had tried to get [the dormitory] opened up ten years ago, when the whole building * * * was closed to women. She raised a complaint at a faculty meeting about this situation; blackballing letters written by faculty members were subsequently placed in her employment file at the law school without her knowledge."); *id.* at 1051 (reprinting magazine article) ("A few [women] fight back—and pay the penalty for bucking the male dominated system."); see also 118 Cong. Rec. 5812 (1972) (reprinting article stating that "on some campuses it is still dangerous to fight sex discrimination. I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such discrimination.").

Congress would have responded to that evidence by providing substantially reduced remedial options for victims of conduct that was so detrimental to the achievement of Congress's goals. A recipient of federal assistance can have no legitimate interest in retaliating against persons who complain about unlawful discrimination, and the court of appeals did not even attempt to identify one.

4. The court of appeals' interpretation of Title IX also conflicts with the interpretation adopted by the Department of Education, the agency with primary responsibility for enforcing Title IX. The Department of Education has adopted a regulation that expressly prohibits "intimidatory" and "retaliatory acts." 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)) (emphasis deleted). That regulation specifies that:

> [n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

Ibid. That regulation reflects the Department of Education's position that "retaliation is prohibited by Title IX." 62 Fed. Reg. 12,044 (1997). Because the Department of Education has primary responsibility for enforcing Title IX, its interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).[2]

Relying on *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the court of appeals discounted the Department of Education's retaliation regulation on the ground that an agency regulation cannot create a private right of action when the statute has not done so. Pet. App. 22a-23a. The court's reliance on *Sandoval* in this context is misplaced. In *Sandoval*, the Court held that Title VI

[2] The Department of Justice is responsible for coordinating the enforcement of Title IX by federal agencies. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980), and it has adopted the same retaliation regulation as the Department of Education, see 65 Fed. Reg. 52,858-52,895 (2000) (adopting Title IX rules for 21 federal agencies including the Department of Justice). The Department of Justice has also stated in a manual directed to federal agencies that retaliation is one of the "general types of prohibited discrimination." U.S. Dep't of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001) <www.usdoj.gov/crt/cor/coord/ixlegal.pdf>. Because the Department of Justice has responsibility for coordinating the enforcement of Title IX by federal agencies, its view is likewise entitled to deference. *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984).

regulations that prohibit discriminatory effects cannot be privately enforced because Title VI itself only prohibits intentional discrimination and agency regulations that go beyond Title VI's prohibitions may not be privately enforced. 532 U.S. at 285-286. The *Sandoval* Court made clear, however, that prohibitions reflected in regulations that validly "construe the statute itself" may be privately enforced because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 283-285. Since the Department of Education's retaliation regulation reflects a valid interpretation of the terms of Title IX itself, that interpretation of the statute may be enforced through the private cause of action conferred by Title IX.

There is no need in this case, however, to rely on that aspect of *Sandoval* or on principles of *Chevron* deference to resolve the question presented. The text, background, and purposes of Title IX all point to the conclusion that Title IX's prohibition against discrimination on the basis of sex incorporates protection against retaliation. The Department of Education's considered view simply reinforces that conclusion.

5. The court of appeals alternatively held that, even assuming that Title IX prohibits retaliation, teachers and coaches who complain about sex discrimination against students are not within the class of persons protected by Title IX. Pet. App. 23a-24a. That holding cannot be reconciled with the text, background, and purposes of Title IX.

The text of Title IX does not require that the victim of discriminatory retaliation must also be the victim of the discrimination that is the subject matter of the original complaint. It simply requires a showing that

the recipient has engaged in retaliation against the complainant "on the basis of sex," and that requirement can be satisfied regardless of whether the complainant is also a victim of the discrimination that was the subject matter of the original complaint. In particular, as discussed above, where the recipient engages in purposeful retaliation because an individual has complained about intentional sex discrimination, Title IX's "on the basis of sex" requirement is satisfied.

Consistent with Title IX's text, the Department of Education's retaliation regulation rejects any distinction between classes of retaliation victims. A recipient violates the regulation when it retaliates against any complainant "for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint [of unlawful sex discrimination]." 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)).

The court of appeals' limitation also conflicts with *Sullivan*. The white victim in *Sullivan* complained about race discrimination directed at his black lessee, and the Court squarely held that he could maintain a private cause of action for discriminatory retaliation.

Finally, Congress's goal of eliminating federal support for sex discrimination and providing protection to individuals against sex discrimination would be ill-served by the court of appeals' limitation. Teachers and coaches are often in a much better position to identify sex discrimination and express opposition to it than are the students who are denied equal educational opportunities.

Thus, the court of appeals not only erred in ruling that Title IX never prohibits retaliation; it also erred in ruling that protection against retaliation could not extend to teachers and coaches who complain about discrimination directed to their students. This Court's review is warranted to correct those erroneous rulings.

B. There Is A Conflict In The Circuits On The Question Presented

Review is also warranted because the court of appeals' decision in this case conflicts with the Fourth Circuit's post-*Sandoval* decision in *Peters* v. *Jenney*, 327 F.3d 307 (2003). In *Peters*, a school district failed to renew the contract of the director of one of its educational programs after she had complained about discrimination against black students. The former director filed suit, alleging that the school district had retaliated against her in violation of Title VI. Relying on the Department of Education's Title VI retaliation regulation, and this Court's decision in *Sullivan*, the Fourth Circuit held that Title VI forbids "purposeful retaliation based upon opposition to practices made unlawful [by Title VI.]" *Id.* at 318. In reliance on *Sullivan*, the Fourth Circuit also held that Peters could maintain a private right of action for retaliation even though she was not one of the students allegedly subjected to the original discrimination. The *Peters* court expressly declined to follow the Eleventh Circuit's decision in this case, on the ground that the Eleventh Circuit "did not consider the impact of *Sullivan* * * * on the question that we decide today." 327 F.3d at 318 n.10.

The court of appeals' decision in this case involves a construction of Title IX, while the Fourth Circuit's decision in *Peters* involves a construction of Title VI. But since Title IX was modeled on Title VI, and the relevant text of Title IX tracks the relevant text of Title VI, *Cannon*, 441 U.S. at 694-696, the two decisions cannot be distinguished on the ground that they address different statutory provisions.

Indeed, in *Litman* v. *George Mason University*, No. 01-2128, 2004 WL 345758 (Feb. 25, 2004), the Fourth Circuit recently issued a summary decision holding that Title IX authorizes a private right of action to seek damages for retaliation. The Fourth Circuit explained that "[b]ecause Title VI and Title IX are to be interpreted in the same manner, * * * the decision in *Peters* compels the conclusion that Title IX likewise includes a private right of action for retaliation." *Id.* at *1 (internal quotation omitted). There is therefore a square conflict between the Eleventh Circuit and the Fourth Circuit on the question presented in this case. Review is warranted to resolve that conflict.[3]

C. The Question Presented Is One Of Recurring Importance

Finally, the question whether Title IX authorizes a private right of action for retaliation is one of recurring importance. That issue and the related issue whether Title VI authorizes a private right of action for retaliation have arisen with increasing frequency in the

[3] In *Lowrey* v. *Texas A & M University System*, 117 F.3d 242, 249-254 (1997), the Fifth Circuit held that there is a private right of action to enforce the Department of Education's retaliation regulation. But that holding appears to have been premised on the view that the regulation could authorize a private right of action for retaliation even if the statute does not, and that line of analysis does not survive *Sandoval*. The Fifth Circuit has not revisited the issue since *Sandoval*. Several other circuits have rejected Title IX retaliation claims on the merits, both before and after *Sandoval*, without specifically addressing the logically prior question whether Title IX prohibits retaliation in the first place. See *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002); *Brine* v. *University of Iowa*, 90 F.3d 271, 273-274 (8th Cir. 1996), cert. denied, 519 U.S. 1149 (1997); *Murray* v. *New York Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995).

lower courts. See *Burch* v. *Board of Regents of University of California*, No. Civ. 8-04-0038 (E.D. Cal. Mar. 16, 2004); *Atkinson* v. *Lafayette Coll.*, No. 01-CV-2141, 2003 WL 21956416 (E.D. Pa. July 24, 2003), appeal pending, No. 03-3426 (3d Cir.); *Chandamuri* v. *Georgetown Univ.*, 274 F. Supp. 2d 71 (D.D.C. 2003); *Mock* v. *South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017 (D.S.D. 2003); *Johnson* v. *Galen Health Insts., Inc.*, 267 F. Supp. 2d 679 (W.D. Ky. 2003).

Moreover, the court of appeals' decision, if left undisturbed, would have serious adverse consequences for the enforcement of those statutes. Effective protection against retaliation is indispensable to the achievement of Congress's nondiscrimination goals. And while agency regulations bar retaliation, private enforcement is necessary to achieve a sufficient level of deterrence against retaliation and to make whole the victims of that unlawful conduct. In any event, because Title IX is designed to provide uniform protection against discrimination throughout the nation in all programs that receive federal funds, there should not be a private cause of action available in some circuits, but not others.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2004

Supreme Court, U.S.
FILED
AUG 19 2004
OFFICE OF THE CLERK

No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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CHRONOLOGICAL LIST OF DOCKET ENTRIES

I. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (Case No. 01-CV-1688)

7/27/01	COMPLAINT filed, amount paid $150, receipt # 200 167107 (sj) [Entry date 07/27/01]
7/27/01	REQUEST of plaintiff for service by certified mail filed (sj) [Entry date 07/27/01]
7/30/01	SUMMONS and COMPLAINT issued by certified mail as to dft Bham Board of Ed (sj) [Entry date 07/30/01]
7/30/01	AMENDED Complaint filed by pla Roderick Jackson [1 - 1]; jury demand filed cs (sj) [Entry date 08/01/01]
8/7/01	SUMMONS and complaint returned executed: upon defendant Birmingham Board of Ed on 8/6/01 filed (sj) [Entry date 08/08/01]
8/16/01	SUMMONS and Amended Complaint issued by certified mail (sj) [Entry date 08/17/01]
8/21/01	SUMMONS and complaint returned executed: upon defendant Birmingham Board Ed on 8/20/01 filed (pg) [Entry date 08/21/01]
9/10/01	MOTION by dft Birmingham Board Ed to dismiss filed cs (sh) [Entry date 09/11/01]

9/13/01 RESPONSE by plaintiff Roderick Jackson to dft's motion to dismiss [6-1] filed cs (sj) [Entry date 09/14/01]

10/9/01 BRIEF (REPLY) by dft Birmingham Bord of Ed in support of its motion to dismiss filed 9/10/01 (doc. # 6) filed cs (sj) [Entry date 10/09/01]

10/17/01 REPLY by pla Roderick Jackson to dft's reply brief [8-1] filed cs (sj) [Entry date 10/19/01]

10/23/01 ORDER that dft's motion to dismiss is SET FOR HEARING; In-Court Hearing SET for Tues 11/6/01 @ l0am Courtroom 2A. Hugo L Black Courthouse, Bham AL filed (by Magistrate-Judge T M Putnam) cm (sj) [Entry date 10/23/01]

10/29/01 ORDER that dft's motion to dismiss (doc.#6) is ready for submission to court for decision; parties are reminded that they may consent to the exercise of full & final jurisdiction by the undersigned w/consent form attchd filed (by Magistrate-Judge T M. Putnam) cm (sj) [Entry date 10/29/01]

11/6/01 COURTROOM NOTES: HEARING on Motion by dft to Dismiss (TMP) - Court's preliminary remarks - Counsel's arguments - WRITTEN ORDER to be entered by the Court - (Karla Johnson, Court Reporter) (rld) [Entry date 11/06/01]

1/8/02 NOTICE of appearance for dft Birmingham Board Ed by Melissa D Evans as co-counsel filed cs (kc) [Entry date 01/08/02]

1/10/02 Report and Recommendation recommend motion to dismiss be granted; objs to R&R to be filed w/in 15 days filed (by Magistrate-Judge T M. Putnam) cm (kc) [Entry date 01/10/02]

1/17/02 OBJECTIONS by pla Roderick Jackson to R&R [13-1] filed cs (kc) [Entry date 01/18/02]

1/17/02 BRIEF - memo of law in support of obj to R&R by pla Roderick Jackson filed cs (kc) [Entry date 01/18/02]

1/23/02 REMARK - objs sent to randomly drawn Judge Propst (kc) [Entry date 01/23/02]

1/24/02 ORDER (Submission) that objection (Doc #14) will be deemed submitted 2/19/02; Responsive Brfs Due by 2/7/02, Reply Brfs Due by 2/19/02 , filed (Judge Robert B. Propst) cm (sl) [Entry date 01/24/02]

2/4/02 BRIEF by dft Birmingham Board Ed in support of Magistrate's R&R filed cs (kc) [Entry date 02/05/02]

2/25/02 MEMORANDUM, opinion, and order filed (by Judge Robert B. Propst) Case reassigned to Judge Robert B. Propst adopting Report and Recommendation [13-1], granting motion to dismiss [6-1], dismissing case cm (kc) [Entry date 02/25/02]

3/5/02 NOTICE of appeal by pla Roderick Jackson from District Court decision [18-3] ; notice of appeal, order appealed from and court copy of docket entries letter mailed cm (ko) [Entry date 03/06/02]

3/5/02 APPEAL fee received in amount of $105 (ko) [Entry date 03/06/02]

3/5/02 Appeal Information Sheet (yellow copy) filed [19-1] (ko) [Entry date 03/06/02]

3/7/02 CERTIFICATE of readiness issued, cm (de) [Entry date 03/07/02]

3/18/02 NOTIFICATION by Circuit Court of Appellate docket number 02-11303B (ko) [Entry date 03/18/02]

6/10/02 CERTIFIED Record on Appeal with certified copy of docket entries and transmittal mailed to USCA cm (sj) [Entry date 06/10/02]

1/22/03 CERTIFIED copy of Appellate Court order filed on 10/21/02 and issued as mandate of court 1/21/03: affirming the decision of the District Court [19-1] filed w/certified copy of slip opinion att; original 1 vol record rec'd (Dubina, Marcus and Goodwin, Circuit Judges) (kl) [Entry date 01/22/03]

II. UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (Case No. 02-11303-BB)

3/5/02 Fee Status: Paid (03/05/02) for Roderick Jackson

3/11/02 Transcript order form - no transcript requested: Appellant-Jackson, Roderick

3/11/02 Certificate of Readiness

3/12/02 Appearance Form Submitted: Kenneth L. Thomas

3/12/02 Appearance Form Submitted: Valerie L. Acoff

3/13/02 DKT2 (Docketing - Regular Notice) issued. cc: Mathis, Perry D. cc: Brooks, Hycall, III cc: Brooks, Charles Isaac To: Braxton, Toni Jacqueline cc: Thomas, Kenneth L. cc: Acoff, Valerie L. cc: Coley, Darnell Delacey cc: Evans, Melissa D.

3/14/02 Probable Jurisdiction Noted: Appellant-Jackson, Roderick

3/15/02 BR1CIV (Brief Letter 1) issued. cc: Thomas, Kenneth L. cc: Acoff, Valerie L. cc: Brooks, Hycall, III cc: Brooks, Charles Isaac cc: Braxton, Toni Jacqueline cc: Coley, Darnell Delacey cc: Evans, Melissa D.

3/15/02 Briefing Notice Issued: 4/22/02

3/22/02 Appearance Form Submitted: Charles Isaac Brooks

3/22/02 Appearance Form Submitted: Toni Jacqueline Braxton

4/12/02 Appellant's Brief Filed: Appellant-Jackson, Roderick (Atty: Toni Jacqueline Braxton)

4/12/02 Record Excerpts

4/23/02 Motion to Withdraw as Counsel: Appellant Attorney-Brooks, Charles Isaac: Appellant Attorney-Braxton, Toni Jacqueline

5/2/02 Party Removed From Case: Charles Isaac Brooks

5/2/02 Party Removed From Case: Toni Jacqueline Braxton

5/2/02 Appellant's counsel, The Brooks Firm, P.C. 's motion to withdraw is GRANTED. smg

5/2/02 MOT2 (Motion - Court Action) issued. cc: Brooks, Charles Isaac To: Braxton, Toni Jacqueline cc: Thomas, Kenneth L. cc: Acoff, Valerie L.

5/7/02 Over the Phone Extension to File answer Brief Granted by REG Until 5/21/02

5/21/02 Appellee Brief Filed: Appellee-Birmingham Board of Education (Atty: Valerie L. Acoff)

6/03/02 Over the Phone Extension to File Reply Brief Granted by JPC Until 6/13/02-Appellant-Roderick Jackson (Pro Se)

6/12/02 Reply Brief Filed: Appellant-Jackson, Roderick (Pro Se)

6/12/02 Record on Appeal

9/27/02 Oral Argument Scheduled: 09/27/02

9/30/02 Appellant Pro Se; Valerie L. Acoff argued for Appellee

10/21/02 Judgment Entered

10/21/02 OPIN1A (Opinion - Issuance with Costs) issued. Each party to bear own costs. cc: Jackson, Roderick cc: Thomas, Kenneth L. cc: Acoff, Valerie L. cc: Propst, Robert B. cc: Putnam, T. Michael

10/21/02 Opinion Issued

11/12/02 Petition for Rehearing En Banc: Appellant-Jackson, Roderick (ProSe)

11/15/02 WRAP-1 (Wrappers w/ addresses) issued. cc: Goodwin, Alfred T.

1/13/03 The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.

1/13/03 REHG1 (Rehearing - Transmittal) issued. cc: Jackson, Roderick cc: Thomas, Kenneth L. cc: Acoff, Valerie L.

1/21/03 CASE CLOSED-Mandate Issued

1/21/03 Mandate Issued

1/21/03 MDT1 (Mandate - Issuance) issued. cc: Jackson, Roderick cc: Thomas, Kenneth L. cc: Acoff, Valerie L. To: Perry D. Mathis cc: Putnam, T. Michael

4/4/03	Ext. for Filing Certiorari - Granted on 3/31/03 (application #02A829), extended the time to and including May 13, 2003.
5/20/03	Notice of Filing Certiorari: (ProSe) 02-1672
10/20/03	Checked Status of Cert. - Pending
11/21/03	Checked Status of Cert. - Pending
12/22/03	Checked Status of Cert. - Pending
1/22/04	Checked Status of Cert. - Pending
3/1/04	Checked Status of Cert. - Pending
4/1/04	Checked Status of Cert. - Pending
5/3/04	Checked Status of Cert. - Pending
6/2/04	Checked Status of Cert. - Pending
7/2/04	Granted as of 7/1/04:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON, Plaintiff. v. BIRMINGHAM BOARD OF EDUCATION, Defendant.	Case No: CV-01-TMP-1866-S

Amended Complaint

Comes now the plaintiff in the above-styled cause and says as follows:

I. Jurisdiction

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331, 1343(a)(1)-(4), 2201 and 2202, 20 U.S.C. §1681 *et seq*. This is a suit authorized and instituted pursuant to Title IX of the Act of Congress known as the "Education Amendment Act of 1972, as amended." The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by 20 U.S.C. §1681 *et seq.*, as amended, providing for injunctive and other relief against gender discrimination and/or retaliation.

2. The plaintiff have fulfilled all conditions precedent to the institution of this action under Title IX of the Act of Congress known as the "Education Amendment Act of 1972," as amended.

II. Parties

3. Plaintiff, Roderick Jackson (hereafter referred to as "Jackson") is an African American, citizen of the United States and a resident of Jefferson County, Alabama. He was employed by the defendant at its Jefferson County, Alabama locations at the time of the alleged acts of discrimination.

4. Defendant, Birmingham Board of Education, (hereafter referred to as "The Board") is an entity subject to suit under Title VII of the Act of Congress known as the "Education Amendment Act of 1972 *et seq.*, as amended." The defendant employs at least Five Hundred (500) persons.

III. Cause of Action: Title IX and 20 U. S. C. § 1681 et. seq., as amended by The Civil Rights Act of 1991 Retaliation Gender Discrimination

5. The plaintiff re-alleges and incorporates by reference paragraph 1-4 above with the same force and effect as if fully stated in specific detail herein below.

6. The defendant discriminated on the basis of gender against the plaintiff, Roderick Jackson, with respect to his employment contract by refusing to contract with plaintiff on terms free of gender bias with respect to adverse terms, conditions, and privileges of employment, in violation, among other laws 20 U.S.C. § 1681 *et seq*, as amended.

7. On or about August 1993 plaintiff was hired as a Physical Education Teacher and Coach. On or about August 1999 plaintiff was transferred to Ensley. Plaintiff's direct supervisor was Evelyn Baugh. On or about December 2000, plaintiff complained to Ms. Baugh about gender discrimination in association with the girls' basketball. Plaintiff also noted serious infractions with regards to the expense accounts. Plaintiff also noted the girls were prohibited from using various equipment including but not limited to the sports facility. The girls team was not

provided a key for the padlock for the facility. Soon thereafter plaintiff received negative evaluations.

8. Plaintiff was subjected to adverse terms of employment because of gender discrimination. Plaintiff was subjected to a work conditions which were limited in enforcement to individuals in a protected class, female.

9. Plaintiff was terminated on May 7, 2001.

VII. Prayer for Relief

WHEREFORE, Premises Considered, plaintiffs respectfully pray that this Honorable Court assume jurisdiction of this action and after trial provide relief as follows:

1. Issue a declaratory judgement that the employment practices, policies, procedures, conditions, and customs of the defendant are violative of the rights of the plaintiff as secured by Title IX and, 20 U.S.C. § 1681, as amended

2. Grant the plaintiff a permanent injunction enjoining the defendant, its agents, successors, employees, attorneys and those acting in concert with the defendant and that the defendant's request from continuing to violate Title IX and, 20 U.S.C. §1681, as amended.

3. Enter an order requiring the defendant to make the plaintiff whole by awarding him back-pay, front pay, nominal, compensatory and punitive damages. Plaintiff also requests any loss of work-related benefits, including but not limited to pension, healthcare, 401(k), vacation pay, holiday pay, compensatory time or any other benefit no matter how it is denoted by the defendant.

4. Plaintiff further prays for such other and further relief and benefits as the cause of justice may require, including, but not limited to, and award of costs, attorney fees and expenses incurred by this litigation.

PLAINTIFFS DEMAND TRIAL BY STRUCK JURY

Respectfully submitted,

/s/ Hycall Brooks, III
Hycall Brooks, III, Atty. Code BRO107

/s/ Charles I. Brooks
Charles I. Brooks, Atty. Code BRO167

/s/ Toni J. Braxton
Toni J. Braxton, Atty. Code HOR034

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON, Plaintiff, vs. BIRMINGHAM BOARD OF EDUCATION, Defendant.	CIVIL ACTION NO.: CV-01-TMP-1866-S

DEFENDANT'S MOTION TO DISMISS

COMES NOW the Defendant, Birmingham Board of Education (hereinafter "Board"), and moves this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss this lawsuit. In support of its Motion, and without waving any other position that might be asserted at a later time, the Board states as follows:

FACTS

1. In July 2001, the Plaintiff filed a Complaint against the Board. Plaintiff's Complaint is not the model of clarity. Construing the Complaint in a light most favorable to the Plaintiff, it appears that the Plaintiff is attempting to assert a claim that the Board discriminated against him on the basis of his gender in violation of "Title IX and 20 U.S.C. § 1681,"[1] and a retaliation claim.

---

[1]Title IX is codified at 20 U.S.C. § 1681, *et seq*.

2. The Plaintiff makes a broad reference to Title VII, but he does not state a Title VII claim or cause of action. Furthermore, the Plaintiff never filed an EEOC charge, which is a prerequisite to filing a Title VII lawsuit.

3. On July 30, 2001, the Plaintiff filed an Amended Complaint. The Board cannot ascertain what, if any, change was made in the Amended Complaint.

4. In his Amended Complaint, the Plaintiff alleges that he complained about gender discrimination in association with the girls basketball team. Specifically, he alleges that the girls team was not provided a key for the padlock for the sports facility, and they were prohibited from using certain equipment.

5. The Plaintiff makes no specific allegations as how the Board discriminated against him on the basis of his gender. He alleges that he received "negative evaluations" and that he "was terminated on May 7, 2001." (Amended Complaint at Paragraph 9). This is not true. The Plaintiff is still employed with the Board.

6. Plaintiff seeks both compensatory and punitive damages against the Board.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO ASSERT A TITLE IX CLAIM

Plaintiff's Title IX claims are due to be dismissed as a matter of law because Plaintiff lacks standing to assert a Title IX claim. The Plaintiff lacks constitutional standing to assert individual claims based on many of the practices for which he seeks relief. As a result, the Plaintiff lacks constitutional standing as well as representative capacity pursuant to Fed. R. Civ. P. 23(b), to assert claims based on those practices on behalf of a plaintiff class, that is, the

female basketball team. *E.g., Grin v. Dugger,* 823 F.2d 1476, 1482-91 (11th Cir. 1987).

> Under elementary principles of standing, a plaintiff must allege and show that [he] personally suffered injury. If [he] cannot show personal injury, then no article III case or controversy exists, and a federal court is powerless to hear [her] grievance. This individual injury requirement is not met by alleging that injury has been suffered by other, unidentified members of the class to which the plaintiff belongs and which [he] purports to represent. Thus, a plaintiff cannot include class action allegations in a complaint and expect to be relieved of personally meeting the requirements of constitutional standing, even if the persons described in the class definition would have standing themselves to sue. A named plaintiff in a class action who cannot establish the requisite case or controversy between [him]self and the defendants simply cannot seek relief for anyone — not for [him]self, and not for any other member of the class.

Griffin, 823 F.2d at 1483 (quotations and citations omitted).

> Moreover, it is not enough that a named plaintiff can establish a case or controversy between [him]self and the defendant by virtue of having standing as to just one of many claims [he] wishes to assert. Rather each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim

The Plaintiff does not contend that he was personally aggrieved by any practice or alleged gender discrimination. The Plaintiff's allegations consist of the following:

(a) he complained about expense accounts;

(b) the girls' team was not provided with a key to the padlock for the sports facility;

(c) the girls were prohibited from using various equipment;

(d) he was subjected to work conditions which were limited in enforcement to individuals in a protected class, female;

(e) he received negative evaluations; and

(f) he was terminated on May 7, 2001.

As previously stated, the Plaintiff's statement in his pleadings that he was terminated is not true. He is still employed with the Board. Also, the Plaintiff could not have received multiple negative evaluations after December 2000 because the academic school year ended in May 2001 and the new academic school year just commenced. Thus, he would have been evaluated only once, if at all, after December 2000. Thus, the two (2) allegations of discrimination that are even remotely related to the Plaintiff are moot. The other allegations pertain to females on the basketball teams who are not a party to this lawsuit, and who have not put the Board of notice a Title IX claim or violation. The Plaintiff has not suffered an injury from the remaining alleged practices.

Thus, Plaintiff's lack of personal injury from the practices alleged deprives him of standing to assert those as violations, either on behalf of himself or as representative of a class. *E.g., Jones v. Firestone Tire and Rubber Company, Inc.*, 977 F.2d 527, 531-34 (11th Cir. 1992); *Griffin*, 823 F.2d at 1482-84.

II. PLAINTIFF FAILS TO STATE A CLAIM UNDER TITLE IX

The Plaintiff has failed to state a claim for relief under Title IX due to his failure to allege how the Board discriminated against him on the basis of their sex. To state a claim for relief under Title IX, a plaintiff must allege that he or she was discriminated against on the basis of sex. *John Does v. Covington Co. Sch. Bd.*, 969 F. Supp. 1264, 1274 (M.D. Ala. 1997). Importantly, this means the plaintiff must make a prima facie case of sex discrimination. *John Does*, 969 F. Supp. at 1274. Here, the Plaintiff's Complaint is devoid of the necessary factual allegations of gender discrimination to support even an inference of sex discrimination against him.

The condition precedent of a prima facie case or inference of sex discrimination for Title IX claims is predicated upon the purpose of Title IX itself–to be free from discrimination on the basis of sex. Thus, it follows logically that, "to maintain a cause of action under Title IX, a plaintiff must allege facts which demonstrate he or she was demonstrated against on the basis of sex." *John Does*, 969 F. Supp. at 1274. In the instant case, the Plaintiff is a male coach for the girls' basketball team. There is no mention of any facts which gave rise to the alleged discriminatory acts or the alleged violations committed by the Board against the Plaintiff on the basis of his gender. In fact, the pleadings are void of any reference or allegation of how *he* was discriminated against personally, only that the *girls basketball team* was discriminated against by a Principal. In other words, the Plaintiff makes no specific allegations, whatsoever, as to how the Board discriminated against him on the basis of *his* gender.

Based on the foregoing, the Plaintiff has failed to state a claim for relief under Title IX and such claims are due to be dismissed as a matter of law.

III. PLAINTIFF'S TITLE IX CLAIM IS DUE TO BE DISMISSED BECAUSE TITLE VII PROVIDES PLAINTIFF'S EXCLUSIVE REMEDY

The Plaintiff's Title IX claim is due to be dismissed because Title VII is the exclusive remedy for allegations of employment discrimination on the basis of sex in federally funded educational institutions. *See, Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998); *accord, Waid v. Merrill Area Public Sch.*, 91 F.3d 857 (7th Cir. 1996). Title VII is the appropriate mechanism to the extent that it alone provides sufficient remedies for the allegations the Plaintiff mistakenly attempts to assert under Title IX. The administrative nature of Title VII sets forth the requirement that claimants pursue their claims in an administrative forum, namely the Equal Employment Opportunity Commission (EEOC), as a condition precedent to proceeding with their claims to federal court. Plaintiff has attempted to circumvent the administrative requirements of Title VII by bringing his claims of employment discrimination under Title IX. As Title VII is the exclusive legislatively created remedy available to the Plaintiff for his cause of action, his Title IX claims are effectively preempted by the administrative scheme and procedural requirements of Title VII. To allow the Plaintiff to veil his Title VII claims under Title IX would, in essence, allow him to circumvent the "precisely drawn, detailed enforcement structure of Title VII by simply filing suit under . . . Title IX, when the underlying facts make suit under Title VII available." *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995). This circumvention would permit him to bring what is, on its face, a Title VII claim without adhering to the same rules that are required of every other employment discrimination plaintiff in the country.

In *Blalock v. Dale County Bd. of Educ.*, 84 F. Supp. 2d 1291 (M.D. Ala. 1999)(DeMent, J.), the court agreed with the other courts that had decided this issue that the plaintiff's

exclusive remedy for monetary damages and injunctive relief was under Title VII. By rejecting both the plaintiff's Title IX and Title VII claims, the court precluded the plaintiff from bringing her Title IX action for damages and equitable relief. *Blalock*, 84 F. Supp. 2d at 1298-99.

In the instant case, the Plaintiff attempts to assert a Title IX claim of gender discrimination. The Plaintiff asserts these theories solely to seek redress for alleged gender-based discrimination in the workplace. He attempts to cloak what is in reality a Title VII claim, under the guise of Title IX because he failed to timely file an EEOC charge of discrimination to trigger a Title VII lawsuit. Based on the foregoing, Plaintiff's Title IX claim is due to be dismissed in its entirety.

IV. PLAINTIFF FAILS TO ASSERT A PRIMA FACIE CASE OF RETALIATION UNDER TITLE IX

The Plaintiff has failed to state a prima facie case of retaliation under Title IX. To assert a retaliation claim under Title IX, a plaintiff must demonstrate that: "(1) she engaged in statutorily protected expression, (2) that there was a subsequent adverse employment action, and that (3) some causal relation exists between the protected expression and the adverse action." *Meeks v. Computer Assoc., Intern.* 15 F.3d 1013, 1021 (11th Cir. 1997). In the instant case, the Plaintiff's pleadings do not make an adequate showing of a subsequent adverse employment action, particularly, as the Plaintiff is remains an active employee of the Board.[2] Furthermore, there is no causal relation between the alleged protected expression and the adverse action as the Plaintiff failed to allege any form of protected expression. Without more than the bare-bones allegations of his Complaint, the

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[2] Under Alabama, a Board's action terminating coaching duties does not constitute a transfer or demotion. *Bryan v. Alabama State Tenure Commission*, 472 So. 2d 1052, 1054 (Ala. Civ. App. 1985).

Plaintiff has failed to state a prima facie case of retaliation under Title IX.

Based on the foregoing, the Plaintiff's retaliation claims under Title IX are due to be dismissed.

V. PLAINTIFF CANNOT RECOVER PUNITIVE DAMAGES AGAINST THE BOARD

The United States Supreme Court has addressed the question whether the damage under Title IX remedy may include an award of punitive damages. Because of the paucity of lower court authority on this point, we approach this question by analogy to comparable civil rights statutes. *Doe v. Petaluma City School District,* 830 F. Supp. 1560, 1576 (N.D. Cal. 1993), *rev'd o.g.*, 54 F.3d 1447 (9th Cir. 1995); *Boughre v. University of Pittsburgh,* 713 F. Supp. 139 (W.D. Pa. 1989), *aff'd,* 882 F.2d 74 (3rd Cir. 1989). We further noted that in claims brought under § 1983 — which, like Title IX, does *not* contain a specific damage provision — , only compensatory and not punitive damages may be recovered form a public entity defendant. *E.g., Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S. Ct. 2748 (1981); *Colvin v. McDougall,* 62 F.3d 1316, 1319 (11th Cir. 1995).

In *City of Newport*, the Supreme Court examined first the traditional immunity of municipal corporations form punitive damages at common law, and then whether considerations of public policy presently dictated a contrary result. The Court noted the distinction at common law between liability to compensate for injures inflicted and "vindictive damages" to punish the actual wrongdoers, and found that "courts viewed punitive damages [against municipal corporations] as contrary to sound public policy, because such awards would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised." 453 U.S. at 263.

The Court further found no policy consideration sufficient to alter the established common law rule:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party.... Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

Id. at 267 (citation omitted).

Although the Supreme Court has not addressed whether punitive damages may properly be assessed against other public entities under §1983 or other civil rights statutes, lower courts have held the same policy considerations apply equally to bar awarding punitive damages against counties under §1983, *e.g., Colvin,* 62 F.3d at 1319, or against municipal school boards under Title VI of the Civil Rights Act of 1964. *E.g., Singh v. Superintending School Committee of the City of Portland,* 601 F. Supp. 865, 867 (D. Me. 1985).

In this Title IX action, as in §1983 actions against public entities, any award of punitive damages would be, in effect, a windfall to a fully compensated Plaintiff. Moreover, the weight of such a remedy imposed against a state school board (such as the Birmingham Board of Education) would fall ultimately on the shoulders of the Board's student body and faculty, which would bear the brunt of any reduction in other services caused by punitive damages awarded on top of any make-whole or compensatory relief.

The conclusion that punitive damages are not recoverable from a public entity (especially a state agency) is bolstered by the passage of the 1991 amendments to Title VII. In passing the Civil Rights Act of 1991, Congress created a damage remedy for plaintiffs who were victims of intentional discrimination, *see* 42 U.S.C. §1981A(b)(1) (Civil Rights Act of 1991); but in so doing, Congress made clear its intent that punitive damages, although recoverable from private defendants, could *not* be awarded against a governmental entity. *See* 137 Cong. Rec. S15, 484 (Oct. 30, 1991) (Kennedy-Danforth interpretive memorandum) (same); 164 Cong. Rec. H9527 (Nov. 7, 1991) (Edwards interpretive memorandum) (same).

Although Congress in 1986 abrogated state sovereign immunity in suits under Title IX, *see* 42 U.S.C. 2000d-7, nothing in that statute nor in its legislative history reflected any intent to make a state university subject to punitive damages under Title IX. By analogy to §1983 and Title VII, punitive damages cannot be recovered from the Board under Title IX.

WHEREFORE PREMISES CONSIDERED

Defendant Birmingham Board of Education respectfully requests that this Court dismiss Plaintiff's Complaint and Amended Complaint with prejudice, enter judgment for the Board and against Plaintiff, and award Defendant their cost of suit, including reasonable attorneys' fees for defending this action, and all other and further relief, both general and specific, to which the Board may justly be entitled.

Respectfully submitted,

/s/ Valerie L. Acoff
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CERTIFICATE OF SERVICE

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/s/ Valerie L. Acoff
OF COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	*
	*
Plaintiff,	*
v.	***CASE NO.**
	***CV-01-TMP-1866-S**
	*
BIRMINGHAM BOARD OF EDUCATION,	*
	*
	*
Defendant.	*

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

COMES NOW the plaintiff, Roderick Jackson, by and through his undersigned counsel, and responds to the defendant's Motion to Dismiss as follows:

Procedural Issues

1. Plaintiff's initial complaint, filed into court on July 27, 2001, alleges a retaliation claim based on Title IX of the Act of Congress known as the "Education Amendment Act of 1972, as amended." The only reference made to Title VII was in ¶ 4 and was clearly a typographical error when taken in context.[1] Plaintiff is not bringing a Title VII claim in this lawsuit, as Title VII does not provide any remedy for Plaintiff 's claims.

[1] The phrase ". . . entity subject to suit under Title VII of the Act of Congress known as the 'Education Amendment Act of 1972. . . " was clearly intended to read Title IX, and not Title VII.

2. On July 30, 2001, Plaintiff filed an Amended Complaint, solely at the request of the Clerk of the District Court, to correct the names of the parties being served. There was no substantive change to the complaint itself.

3. Lastly, the defendant argues that plaintiff was not terminated as he is "still employed with the Board." While it is true that Plaintiff is still employed as a tenured instructor, Plaintiff was terminated from his position as an athletic coach, and it is about this adverse employment action that plaintiff complains.

Plaintiff's Standing to Assert Title IX Claim

The defendant's first argument is that Plaintiff lacks standing to bring a Title IX claim because he has not shown any personal injury. "If a defendant moves to dismiss a complaint for lack of standing, a court must accept as true all of the plaintiff's material allegations." Bischoff v. Osceola County, Fla., 222 F.3d 874, 879 (11th Cir. 2000).

In plaintiff's complaint, as amended, he alleges he received negative evaluations and was terminated, both of which are adverse employment actions. Hence, taking the plaintiff's allegations as true, Plaintiff has shown personal injury sufficient to establish standing. Any factual dispute as to whether Plaintiff actually received any negative evaluations or whether he was terminated from his position as a coach is not to be resolved by the Court. Id. Therefore, the defendant's argument that plaintiff lacks standing is without merit and its Motion to Dismiss is due to be denied.

Plaintiff's Claim under Title IX

Plaintiff's claim under Title IX is based solely on retaliation. Plaintiff is not alleging he was discriminated against because of his sex, but rather that he was retaliated against for opposing the Defendant's non-compliance with Title IX. Title IX provides in pertinent part that "[n]o person

in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). The administrative regulations promulgated by the Department of Education for the purpose of implementing and enforcing Title IX "prohibit retaliation against any individual who has made a complaint, testified, or participated in any manner in an investigation into alleged noncompliance with Title IX." *See* 34 C.F.R. § 100.7(e). Lowrey v. Texas A & M University System, 117 F.3d 242, 249 (5th Cir. 1997). Hence, Title IX affords a private right of action for retaliation against the employees of federally funded educational institutions. Id.

Plaintiff alleges that the defendant was in violation of Title IX in several ways: (1) by prohibiting the girls' athletic teams from using certain equipment, (2) by refusing the girls' athletic teams the same access to the sports facilities, and (3) by committing serious infractions with regards to the girls' athletic teams' expenses accounts. Plaintiff further alleges that he complained about these violations and gender discrimination to his supervisor and subsequently, at least two forms of adverse employment action occurred, (1) he received negative evaluations and (2) his job as coach was terminated.

A court may dismiss a complaint for failure to state a claim "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations in the complaint." *See* Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L.Ed.2d 59 (1984); *see also* Wright v. Newsome, 795 F.2d 964, 967 (11th Cir.1986) ("[W]e may not ... [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief.") (citation omitted).

The court must accept as true all well-pleaded factual allegations and will view them in a light most favorable to the nonmoving party. Williams v. City of Montgomery, 21 F.Supp.2d 1360, 1363 (M.D.Ala. 1998) (citing Hishon, 467 U.S. at 73, 104 S. Ct. 2229). Furthermore, the threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. Ancata v. Prison Health Services, Inc., 769 F.2d 700, 703 (11th Cir.1985).

Therefore, accepting the factual allegations as true and viewing them in a light most favorable to the nonmoving party, Plaintiff has stated a claim for Title IX retaliation. Hence, the defendant's Motion to Dismiss is due to be denied.

Title VII Does Not Provide a Remedy for Plaintiff

The defendant's third argument is that Title VII provides Plaintiff the exclusive remedy for his claims of discrimination. However, this very issue has been addressed by the courts. In Blalock v. Dale County Bd. of Educ., 84 F.Supp.2d 1291 (M.D.Ala. 1999), the Middle District recognized that a Title IX claim seeking redress for retaliation "requires a slightly different analysis" when determining whether Title VII precludes the Title IX action. Id. at 1299.

In its analysis, the Middle District stated that "[t]he Fifth Circuit distinguished between a retaliation claim for opposing employment discrimination practices and a retaliation claim for opposing practices under Title IX." Id. The Fifth Circuit held that:

> . . . the anti-retaliation provisions of titles VII and IX are not identical, and [T]itle VII provides no remedy for retaliation against individuals who raise charges of noncompliance with the substantive provisions of [T]itle IX. Title VII prohibits retaliation only against individuals who oppose discriminatory employment practices or

> participate in complaints or investigations of employment practices prohibited by [T]itle VII. . . . Title VII provides no remedy, however, to employees of federally funded educational institutions who have suffered retaliation as a consequence of their opposition to noncompliance with [T]itle IX. Consequently, [the plaintiff] asserts a cause of action for retaliation that arises exclusively under [T]itle IX, without a corollary right under [T]itle VII. Under such circumstances, [T]itle VII does not preempt [T]itle IX.

Lowrey, 117 F.3d at 248-249.

Hence, pursuant to the standard articulated in Blalock and Lowrey, Plaintiff's Title IX retaliation claim is not precluded by Title VII, therefore the defendant's Motion to Dismiss based on these grounds is due to be denied. Lastly, Plaintiff does not dispute that he cannot recover punitive damages against the defendant under Title IX and hereby rescinds any demand for punitive damages stated in his complaint.

WHEREFORE, Premises Considered, Plaintiff respectfully requests that the defendant's Motion to Dismiss be denied.

Respectfully Submitted,

/s/ Toni J. Braxton
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	*
	*
Plaintiff,	*
v.	*CASE NO.
	*CV-01-TMP-1866-S
	*
BIRMINGHAM BOARD OF EDUCATION,	*
	*
	*
Defendant.	*

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on the counsel of record for the opposing party, by U.S. mail, first class postage prepaid and properly addressed on this the _____ day of September, 2001.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON, Plaintiff, vs. BIRMINGHAM BOARD OF EDUCATION, Defendant.	CIVIL ACTION NO.: CV-01-TMP-1866-S

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Defendant Birmingham Board of Education ("Board"), files this Reply Brief in support of its Motion to Dismiss. In support of its Motion, and without waiving any claims that might be asserted later, the Board states the following:

I. The Issues Have Been Narrowed, But The Complaint Still Fails to State a Claim

Plaintiff's Response to Defendant's Motion to Dismiss has narrowed and clarified the issues, but it is not adequate to cure the defects in the Complaint. As presently constituted, the Complaint fails to establish that Plaintiff has standing and fails to state a claim for which relief can be granted. Therefore, the Complaint should be dismissed as a matter of law.

It now appears that Plaintiff's sole claim is for retaliation under Title IX of the Education Amendment Act of 1972, 20 U.S.C. § 1681(a). Plaintiff has disclaimed any reliance on or

claim under Title VII as well as any claim that he was discriminated against based on his sex. Instead, his claim is that he was retaliated against for opposing the Board's alleged non-compliance with Title IX. Importantly, Plaintiff has conceded that punitive damages may not be recovered against the Board.

II. Plaintiff Lacks Standing to Assert a Title IX Claim

As discussed in the Motion to Dismiss, Plaintiff's Title IX claims are due to be dismissed as a matter of law because Plaintiff has failed to establish that he has standing to assert a Title IX claim. In his Response, Plaintiff concedes that he is not asserting a substantive claim under Title IX on behalf of the members of the girls basketball team. (Response, P. 2). His only claim is for retaliation, but Plaintiff has failed to establish that he suffered an injury cognizable under Title IX. *E.g.*, *Grin v. Dugger,* 823 F.2d 1476, 1482-91 (11th Cir. 1987).

III. Plaintiff Fails to State a Claim under Title IX

The Complaint fails to state a claim for relief under Title IX for two reasons, one procedural and one substantive. First, the Complaint does not clearly allege all the elements of a retaliation claim. More importantly, Title IX does not support a private cause of action for retaliation against an employee.

A. There Is No Private Cause of Action under Title IX for Discrimination Against Employees

Plaintiff's argument on this central issues relies on a district court case from the Middle District of Alabama and a single case from the Fifth Circuit. Plaintiff failed, however, to address the only case from the Northern District of Alabama which has addressed claims for retaliation under Title IX, *Holt v. Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995). In a cogent and well-reasoned analysis, Judge Acker concluded that there was no private cause of action for

retaliation. *Holt,* 955 F. Supp. at 1389. Judge Acker began his analysis of private whistle blower suits under Title IX with the language of the statute, which provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Holt, 955 F. Supp. at 1388, *quoting,* 20 U.S.C. §1681(a).

Judge Acker went on to compare the remedies and protections of Title IX with those of Title VII and concluded that there is no implied private right of action for retaliation. *Holt,* 955 F. Supp. at 1389. There is no express statutory remedy for retaliation under Title IX, and only a limited private right of action by victims of direct discrimination. *See, Cannon v. Univ. of Chicago,* 441 U.S. 677, 717, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979); *see also, Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60, 112 S. Ct. 1028, 1032, 117 L. Ed. 2d 208 (1992).

Judge Acker noted that neither the Supreme Court nor the Eleventh Circuit has recognized a cause of action for retaliatory discharge under Title IX. *Holt,* 955 F. Supp. at 1388. He then compared the provisions of Title IX and Title VII:

> Unlike the creators of § 2000e-3(a) of Title VII, the congressional authors of Title IX failed to include any express protections against retaliation when considering the problems of gender equity in our nation's educational institutions. This failure to speak is significant when compared to § 2000e-3, a vital piece of the Title VII safeguards enacted only eight years prior to Title IX. When presented with such a stark contrast in otherwise closely related

> civil rights legislation, it is helpful to keep in mind that "congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated." *United States v. Azeem,* 946 F.2d 13, 17 (2d Cir. 1991). Congress has shown that where it intends to outlaw retaliation in the protection of civil rights, it will do so. Plaintiff has failed to persuade this court that the omission of such protection from Title IX is a mere oversight.
>
> Having said this, this court acknowledges a limited trend by other courts that recognize "retaliation" claims under Title IX. *See Preston v. Commonwealth of Va. ex rel. New River Community College,* 31 F.3d 203 (4th Cir. 1994); *Clay v. Bd. of Trustees of Neosho Community College,* 905 F. Supp. 1488, 1995 WL 646537 (D. Kan. 1995). The standard bearer for this trend and the case primarily relied upon by plaintiff for arguing that such a cause of action exists is Preston. Beside the obvious statement that Fourth Circuit law is not binding precedent in this case, this court respectfully declines to be swept up in this trickle and expressly refuses to turn it into a veritable flood by creating a second layer of implied theory of liability by expanding dramatically upon a non-binding opinion which created an implied cause of action only within the Fourth Circuit.

Holt, 955 F. Supp. at 1388.

Judge Acker's opinion gave little weight to administrative regulations that purport to create a private cause of action under Title IX. The opinion found the link to be "tortured" and its effect outweighed by the argument that Congress knows how to create remedies for retaliation when

it chooses, as evidenced by the different approach used in Title VII. *Holt*, 955 F. Supp. at 1389.

Holt was decided before *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997), but *Lowery* does not challenge the analysis in *Holt*. The analysis in *Lowery* and *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995), turned on whether Title IX was preempted by Title VII and whether Title IX could be used to circumvent the remedial scheme of Title VII. Neither of those cases discussed the more fundamental question of whether an implied private cause of action for retaliation is even allowable under Title IX. We have been unable to locate any binding Eleventh Circuit case which acknowledges the availability of an implied private cause of action for retaliation under Title IX.[1]

B. **Plaintiff Fails to Assert a Prima Facie Case of Retaliation under Title IX**

Plaintiff has failed to state a prima facie case of retaliation under Title IX. To assert a retaliation claim under Title IX, a plaintiff must demonstrate that: "(1) she engaged in statutorily protected expression, (2) that there was a subsequent adverse employment action, and that (3) some causal relation exists between the protected expression and the adverse action." *Meeks v. Computer Assoc. Int'l.*, 15 F.3d 1013, 1021 (11th Cir. 1994). In the instant case, the Complaint does not make an adequate showing of a causal relation between the protected activity and the subsequent adverse employment action.

[1] There are several district court cases, discussed in the Board's Motion and Plaintiff's Response which discuss Title VII preemption, but no Eleventh Circuit cases. There are also no district court cases from this circuit discussing the more fundamental approach used in *Holt*.

The Complaint contains no allegation of a causal relation between the alleged protected activity[2] and the alleged adverse action. Nor does it allege any facts from which retaliation can be reasonably inferred. There is simply an allegation that the loss of the coaching position occurred about five months after the complaints of discrimination. Moreover, there is no allegation that any members of the Board or the Superintendent, who made the decision concerning Plaintiff's coaching duties, were aware of the complaints to Ms. Baugh. Without some allegations to connect the protected activity with the adverse action, the claim must fail.[3]

Based on the foregoing, the Plaintiff's retaliation claims under Title IX are due to be dismissed.

WHEREFORE, PREMISES CONSIDERED, Defendant Birmingham Board of Education respectfully requests that this Court dismiss Plaintiff's Complaint and Amended Complaint with prejudice, enter judgment for the Board and against Plaintiff, and award Defendant their cost of suit, including reasonable attorneys' fees for defending this action, and all other and further relief, both general and specific, to which the Board may justly be entitled.

[2] The Complaint does not clearly set forth facts form which it can be determined that the girls team was in fact treated less favorably than the corresponding boys team. For example, the Complaint alleges that certain facilities were prohibited to the girls team, but does not allege that the boys team had superior access to this equipment or access to better practice times and facilities. Nor does the Complaint explicitly allege that the lack of equipment and facilities was a result of gender discrimination. Nonetheless, we will assume for present purposes that the allegations meet the "exceedingly low" threshold for surviving a motion to dismiss.

[3] Defendant had legitimate non-discriminatory reasons for the termination of Plaintiff's coaching duties; however, these reasons involve evidentiary issues that may be addressed at a later date, if this case survives this dispositive motion.

Respectfully submitted,

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/s/ Valerie L. Acoff
OF COUNSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	*
	*
Plaintiff,	*
v.	*CASE NO.
	*CV-01-TMP-1866-S
	*
BIRMINGHAM BOARD OF	*
EDUCATION,	*
	*
Defendant.	*

PLAINTIFF'S REPLY TO DEFENDANT'S REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

COMES NOW the plaintiff, Roderick Jackson, by and through his undersigned counsel, and responds to the Defendant's Reply Brief in Support of Defendant's Motion to Dismiss as follows:

Plaintiff's claim under Title IX is based solely on retaliation. Plaintiff is not alleging he was discriminated against because of his sex, but rather that he was retaliated against for opposing the Defendant's non-compliance with Title IX. Title IX provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). The administrative regulations promulgated by the Department of Education for the purpose of implementing and enforcing Title IX "prohibit retaliation against any individual who has made a complaint, testified,

or participated in any manner in an investigation into alleged noncompliance with Title IX." *See* 34 C.F.R. § 100.7(e). Lowrey v. Texas A & M University System, 117 F.3d 242, 249 (5th Cir. 1997). Hence, Title IX affords a private right of action for retaliation against the employees of federally funded educational institutions. Id.

Plaintiff alleges that the defendant was in violation of Title IX in several ways: (1) by prohibiting the girls' athletic teams from using certain equipment, (2) by refusing the girls' athletic teams the same access to the sports facilities, and (3) by committing serious infractions with regards to the girls' athletic teams' expenses accounts. Plaintiff further alleges that he complained about these violations and gender discrimination to his supervisor and subsequently, at least two forms of adverse employment action occurred, (1) he received negative evaluations and (2) his job as coach was terminated.

A court may dismiss a complaint for failure to state a claim "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations in the complaint." *See* Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L.Ed.2d 59 (1984); *see also* Wright v. Newsome, 795 F.2d 964, 967 (11th Cir.1986) ("[W]e may not ... [dismiss] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims in the complaint that would entitle him or her to relief.") (citation omitted).

The court must accept as true all well-pleaded factual allegations and will view them in a light most favorable to the nonmoving party. Williams v. City of Montgomery, 21 F.Supp.2d 1360, 1363 (M.D.Ala. 1998) (citing Hishon, 467 U.S. at 73, 104 S. Ct. 2229). Furthermore, the threshold is "exceedingly low" for a complaint to survive a motion to dismiss for failure to state a claim. Ancata v. Prison Health Services, Inc., 769 F.2d 700, 703 (11th Cir.1985).

The defendant cites a decision by Judge Acker in Holt v. Lewis, 955 F.Supp. 1385 (N.D. Ala. 1995) as standing for the proposition that there is no private cause of action for retaliation. Although Judge Acker acknowledged a trend by other courts to recognize retaliation claims under Title IX, he chose to take a different approach. It should be noted that Judge Acker made a similar analysis that was reversed by the Eleventh Circuit in Andrews v. Lakeshore Rehabilitation Hosp., 140 F.3d 1405 (11th Cir. 1998) .

In Andrews, Judge Acker *sua sponte* dismissed the plaintiff's retaliation claim as not cognizable under section 1981. Id. at 1407. As in the present case, the Eleventh Circuit had "not yet addressed the types of retaliation claims cognizable under § 1981 in light of the Civil Rights Act of 1991." Id. at 1411. However, the Eleventh Circuit noted that two cases from other circuit courts appeared to presume that a retaliation claim may be brought under the amended section 1981. Id. at 1411, fn. 13. The Eleventh Circuit then held that the plaintiff's retaliation claim could proceed under section 1981, and reversed the District Court. In the instant case, the Fifth Circuit has addressed this issue directly, in a case decided two years after Judge Acker's decision in Holt. Following the reasoning of the Fifth Circuit, accepting the factual allegations as true and viewing them in a light most favorable to the nonmoving party, Plaintiff has stated a claim for Title IX retaliation. Hence, the defendant's Motion to Dismiss is due to be denied.

WHEREFORE, Premises Considered, Plaintiff respectfully requests that the defendant's Motion to Dismiss be denied.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
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RODERICK JACKSON,	*
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Plaintiff,	*
v.	*CASE NO.
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BIRMINGHAM BOARD OF EDUCATION,	*
	*
	*
Defendant.	*

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing on the counsel of record for the opposing party, by U.S. mail, first class postage prepaid and properly addressed on this the 17th day of October, 2001.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON, Plaintiff, vs. BIRMINGHAM BOARD OF EDUCATION, Defendant.	CIVIL ACTION NO.: CV-01-TMP-1866-S

DEFENDANT'S BRIEF IN SUPPORT OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Defendant Birmingham Board of Education ("Board"), files this Brief in Support of the Magistrate Judge's Report and Recommendation. For the reasons discussed below, the Complaint should be dismissed for failure to state a claim.

I. Facts and Standard of Review

The Magistrate's Report does not make any findings of fact, presumably because the decision concerns a motion to dismiss and all allegations are accepted as true. The Board does not take issue with the standard of review set forth in the Plaintiff's Memorandum of Law in Support of Plaintiff's Objection to Magistrate Judge's Report and Recommendation (the "Memorandum of Law"). Even under this standard of review, the complaint is due to be dismissed

because the Plaintiff fails to state a claim for which relief can be granted.

The Plaintiff has acknowledged that his sole claim is for retaliation under Title IX of the Education Amendment Act of 1972, 20 U.S.C. § 1681(a). [1] Memorandum, at 3.[2]

II. Plaintiff Fails to State a Claim under Title IX

The Complaint fails to state a claim for relief under Title IX for two reasons. First, and most importantly, Title IX does not support a private cause of action for retaliation. In addition, if the first point is not dispositive, the Complaint does not clearly allege all of the elements of a retaliation claim.

A. There Is No Private Cause of Action under Title IX for Retaliation.

The Magistrate's Report concludes that there is no private cause of action for retaliation under Title IX. That conclusion was based on the only case from the Northern District of Alabama which has addressed this issue. *Holt v. Lewis,* 955 F. Supp. 1385 (N.D. Ala. 1995), *aff'd,* 109 F.3d 771 (11th Cir. 1997) *(table), cert. denied,* 522 U.S. 817, 118 S. Ct. 67 (1997). The Magistrate's Report noted that he found *Lowery v. Texas A&M Univ.* Sys., 117 F.3d 242 (5th Cir. 1997), to be persuasive, but felt bound by *Holt.*

The Magistrate's Report is right to follow *Holt,* but wrong in finding *Lowrey* persuasive. The *Holt* opinion is

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[1] Section 1681 provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

[2] This concession moots any discussion of whether the Plaintiff has standing to sue with respect to the alleged discrimination suffered by the members of the girl's basketball team.

both cogent and prescient. By focusing on the text of the statute, *Holt* anticipated *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), which is dispositive.[3]

Alexander dramatically restricted the reach of implied private rights of action when it held that there was not an implied private right of action for disparate impact discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.[4] The Supreme Court focused on the text of the statute and the court's

> understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right, but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy or how compatible with the statute.

Alexander, 121 S. Ct. at 1519-20 (citations omitted).

The Court's analysis began and ended with the text and structure of Title VI. *Alexander* noted that section 601 prohibits intentional discrimination, but does not prohibit disparate impact.[5] Thus, there was a private right to enforce

[3] The *Holt* opinion gave little weight to administrative regulations that purport to create a private cause of action under Title IX. *Holt*, 955 F. Supp. at 1389.

[4] Title VI was found to be the model for Title IX, *Alexander*, 121 S. Ct. at 1515-16; *See, Cannon v. Univ. of Chicago*, 441 U.S. 677, 717, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979).

[5] Section 601 provides in pertinent part that no person "shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

section 601's prohibition against intentional discrimination, *see, Cannon v. Univ. of Chicago*, 441 U.S. 677, 717, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979), but no basis for a private right of action to recover for disparate impact discrimination. The only prohibition against disparate impact discrimination was contained not in the statute, but in the regulations enacted under § 602, which authorized federal agencies to issue regulations to effectuate the provisions of § 601. The regulations at issue did expressly prohibit disparate impact.

The Court concluded that regulations could not support a private cause of action in the absence of congressional intent to create such a cause of action. Interpretative regulations can validly be used to define what the statute does or does not prohibit, but they cannot create a right that Congress did not. *Alexander*, 121 S. Ct. at 1522. The use of private rights of action to enforce interpretative regulations is legitimate because the action is really enforcing the statute itself. The regulations only serve to interpret what the statute meant. Regulations such as those under § 602 go further and create new rights beyond what Congress created. That is demonstrated by the fact that § 601 did not prohibit disparate impact discrimination. The administrative could not support private rights of action to prohibit conduct that the statute permitted.

We have been able to find only two cases considering the effect of *Alexander* on retaliation claims under Title IX. *Litman v. George Mason University*, 131 F. Supp. 2d 795 (E.D. Va. 2001); *Atkinson v. Lafayette College*, 2002 WL 123449 (E.D. Pa. January 29, 2002). Both firmly held that Title IX did not create a private right of action for retaliation.

Litman noted that Title IX was intended to be interpreted and enforced in the same manner as Title VI. *Id.*, 131 F.

or activity" covered by Title VI. 42 U.S.C. § 2000d. *See Alexander v. Choate*, 469 U.S. 287, 293, 105 S. Ct. 712 (1985).

Supp. 2d at 581; *Alexander*, *supra*, *Cannon*, *supra*. Thus, Alexander is controlling with respect to private rights under Title IX. Title IX does not contain a prohibition against retaliation.[6] The only prohibition against retaliation is contained in regulations promulgated under § 902. 20 U.S.C. §1682. Relying on *Alexander*, the *Litman* court held that the regulations could not create an implied private right of action for retaliation. Administrative regulations cannot create a private right of action to prohibit an act (e.g., retaliation) not prohibited by the statute. Only Congress can create a federal right or a means of enforcing a federal right.

Litman also determined that "retaliation" is not the same as discrimination. Although Title VII defines discrimination to include retaliation, that is based on specific language in the statute and is not applicable to Title IX. Moreover, the anti-retaliation provision in Title VII is narrowly focused on retaliation concerning noncompliance with Title VII and is limited by the complex remedial scheme under Title VII. Therefore, Title VII was not instructive with respect to retaliation under Title IX. Therefore, *Litman* concluded that there was no private remedy for retaliation under Title IX.

The holdings in *Alexander*, *Litman*, *and Atkinson* suggest that *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997), is no longer good law to the extent that it recognizes a private right of action for retaliation under Title IX. The court need not, however, reach that question because *Lowery* is not binding on this court and because the foregoing authorities corroborate the holding of *Holt* that there is no

[6] Title IX provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. 20 U.S.C. § 1681 (a)

private right of action for retaliation under Title IX. Therefore, the suit is due to be dismissed.

B. Plaintiff Fails to Assert a Prima Facie Case of Retaliation under Title IX

To the extent that there remains any doubt, the Court should note that the Plaintiff has failed to state a prima facie case of retaliation under Title IX. To assert a retaliation claim under Title IX, a plaintiff must demonstrate that: "(1) she engaged in statutorily protected expression, (2) that there was a subsequent adverse employment action, and that (3) some causal relation exists between the protected expression and the adverse action." *Meeks v. Computer Assoc. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994). In the instant case, the Complaint does not make an adequate showing of a causal relation between the protected activity and the subsequent adverse employment action.[7]

The Complaint contains no allegation of a causal relation between the alleged protected activity and the alleged adverse action. Nor does it allege any facts from which retaliation can be reasonably inferred. There is simply an allegation that the loss of the coaching position occurred about five months after the complaints of discrimination. Moreover, there is no allegation that any members of the Board or the Superintendent, who made the decision concerning Plaintiff's coaching duties, were aware of the complaints to Ms. Baugh. Without some allegations to

[7] The Complaint does not clearly set forth facts form which it can be determined that the girls team was in fact treated less favorably than the corresponding boys team. For example, the Complaint alleges that certain facilities were prohibited to the girls team, but does not allege that the boys team had superior access to this equipment or access to better practice times and facilities. Nor does the Complaint explicitly allege that the lack of equipment and facilities was a result of gender discrimination. Nonetheless, we will assume for present purposes that the allegations meet the "exceedingly low" threshold for surviving a motion to dismiss.

connect the protected activity with the adverse action, the claim must fail.[8]

Based on the foregoing, the Plaintiff's retaliation claim under Title IX is due to be dismissed.

WHEREFORE, PREMISES CONSIDERED, Defendant Birmingham Board of Education respectfully requests that this Court dismiss Plaintiff's Complaint and Amended Complaint with prejudice, enter judgment for the Board and against Plaintiff, and award Defendant their cost of suit, including reasonable attorneys' fees for defending this action, and all other and further relief, both general and specific, to which the Board may justly be entitled.

Respectfully submitted,

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[8] Defendant had legitimate non-discriminatory reasons for the termination of Plaintiff's coaching duties; however, these reasons involve evidentiary issues that may be addressed at a later date, if this case survives this dispositive motion.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing by placing a true and correct copy of same in the United States Mail, postage prepaid and properly addressed on this the 4th day of February, 2002, to the following:

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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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IN THE

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BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 309 F.3d 1333 (11th Cir. 2002) and is reprinted in the appendix to the petition for a writ of certiorari (Pet. App.) at 1a-26a. The memorandum opinion and order of the district court adopting the report and recommendation of the magistrate judge are unpublished and are reprinted at Pet. App. 27a-33a.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2002. The court of appeals denied a petition for rehearing and rehearing en banc on January 13, 2003. On March 31, 2003, Justice Kennedy extended the time within which to file a petition for a writ of certiorari until May 13, 2003, and the petition was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of Title IX of the Education Amendments of 1972, the relevant sections of which are codified at 20 U.S.C. §§ 1681 and 1682. The full texts of those statutory provisions, as well as relevant regulations, are set out in appendices to this brief. App., *infra*, 1a-6a & 7a-8a.

STATEMENT OF THE CASE

Petitioner Roderick Jackson brought this action after respondent Birmingham Board of Education deprived him of his coaching position when he raised concerns about unlawful sex discrimination against the girls' basketball team that he coached at a Birmingham high school. At stake in the case is the right of individuals to protect themselves and others against discrimination without fear of reprisal – a right that is critical to the effectiveness of Title IX's prohibition on sex discrimination.

1. The legal question presented is whether the long-recognized private right of action for violations of Title IX encompasses redress for retaliation based on complaints about sex discrimination. Title IX broadly prohibits discrimination on the basis of sex in educational programs and activities that receive Federal financial assistance. The statute provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a). More than 25 years ago, in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court held that Title IX's prohibition against discrimination is enforceable through a private right of action.

Title IX also empowers Federal agencies that extend financial assistance to educational programs and activities to promulgate regulations interpreting and implementing the statutory ban on sex discrimination. As relevant here, the statute provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title . . . by issuing rules, regulations, or orders of general applicability . . . .

20 U.S.C. § 1682. The Department of Health, Education, and Welfare (HEW), the predecessor to the current Department of Education, took the lead in promulgating regulations. In its initial regulations, promulgated in 1975, HEW interpreted the statutory ban on discrimination to bar retaliation. Those regulations adopted by cross-reference existing regulations implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, a parallel statute that prohibits recipients of federal funding from discriminating on the basis of "race, color, or national origin." *See* 45 C.F.R. § 86.71 (1975) (incorporating 45 C.F.R. § 80.7(e) (1975)). The current regulations of the Department of Education are substantively identical to the initial HEW regulations. 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7(e)). The provision addressing retaliation, entitled "Intimidatory or retaliatory acts prohibited," provides, in relevant part:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [20 U.S.C. § 1681] or this part, or because he has made a complaint, testified, assisted, or participated in any manner in

an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e).

Although HEW (and later the Department of Education) has historically taken the lead on substantive interpretation and enforcement of Title IX, since 1980 the Department of Justice (DOJ) has been charged by Executive Order with responsibility for coordinating Title IX implementation and enforcement. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980). In that capacity, DOJ supervised the promulgation, on behalf of itself and 20 other federal agencies, of substantively identical regulations implementing Title IX. 65 Fed. Reg. 52,858 (2000). Those common regulations contain provisions parallel to the Department of Education's regulation interpreting Title IX to prohibit retaliation. *See id.*

2. As described in the amended complaint, and recounted by the court of appeals, petitioner Roderick Jackson has been an employee of the Birmingham school district for over ten years.[1] In 1993, respondent hired petitioner to serve as a physical education teacher and girls' basketball coach. In August 1999, petitioner was transferred to Ensley High School, where he continued to serve as a girls' basketball coach. At Ensley, petitioner discovered that the girls' team was being denied equal funding and equal access to athletic equipment and facilities, including a key to the sports facility. Joint Appendix (J.A.) 10-11; Pet. App. 3a.

The inequitable treatment of the team also adversely affected petitioner as the team's coach. Because the team was not afforded funding, equipment, and facilities

[1] Because the case comes to this Court on review of the dismissal of petitioner's amended complaint for failure to state a claim, the Court must accept the truth of the allegations. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

equivalent to those offered to boys' teams, petitioner was denied an equal playing field from which to coach. Accordingly, his working conditions were not equivalent to those of other coaches because of different treatment based on sex. *See* J.A. 10-11 (alleging that respondent "refuse[d] to contract with [petitioner] on terms free of gender" and that he "was subjected to adverse terms of employment because of gender discrimination").

In December 2000, petitioner began protesting the unequal treatment of the team to his supervisors. They did not take corrective action. Instead, petitioner received negative work evaluations and ultimately, in May 2001, respondent removed petitioner from his coaching position. J.A. 10-11; Pet. App. 3a.

3. After respondent terminated petitioner's coaching duties, petitioner filed suit against respondent in the United States District Court for the Northern District of Alabama. Petitioner, alleged, *inter alia*, that respondent retaliated against him in violation of Title IX because of his complaints about discrimination against the girls' basketball team and in his terms of employment. J.A. 10-11. Respondent moved to dismiss the case on the ground that Title IX's private cause of action does not encompass claims of retaliation. *See* Pet. App. 31a.

The case was referred to a magistrate judge. The magistrate stated that he found "persuasive" cases from other courts of appeals recognizing a retaliation claim under Title IX. Pet. App. 31a. Nonetheless, the magistrate concluded that he was bound to reject the existence of such a claim by Eleventh Circuit precedent. He explained that the court of appeals had summarily affirmed a prior decision of the district court holding that Title IX does not prohibit retaliation. *Id.* at 31a-32a (citing *Holt v. Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995), *aff'd*, 109 F.3d 771 (11th Cir. 1997) (Table), *cert. denied*, 522 U.S. 817 (1997)). The district

court adopted the report and recommendation of the magistrate judge. *Id.* at 27a.

4. Petitioner appealed, and the Eleventh Circuit affirmed the dismissal of the complaint. Pet. App. 1a-26a. The court of appeals "assume[d] for purposes of [the] appeal that [respondent] retaliated against [petitioner] for complaining about perceived Title IX violations." *Id.* at 3a. The court held that the petitioner's suit must nonetheless be dismissed because Title IX does not prohibit retaliation or provide a right of action to redress it. *Id.* at 22a.

After describing the statute and applicable regulations, Pet. App. 3a-8a, the court of appeals began its analysis by stating that its decision was "governed in substantial measure by [this Court's] recent decision in *Alexander v. Sandoval*, [532 U.S. 275 (2001)]." *Id.* at 8a. At issue in *Sandoval* was whether a regulation prohibiting practices with a disparate impact on protected classes, promulgated under Title VI of the Civil Rights Act of 1964, gives rise to a private right of action for disparate impact violations. This Court concluded that, because Title VI itself does not prohibit practices with a disparate impact, no private right of action to challenge disparate impact discrimination exists. *See id.* at 10a-12a; *Sandoval*, 532 U.S. at 285-86.

After a lengthy discussion of *Sandoval* and the availability of a private claim for disparate impact under Title VI, Pet. App. 8a-17a, the court of appeals turned to the question presented here: whether claims for retaliation are cognizable under Title IX. Examining Title IX through the lens of *Sandoval*, the court could "find nothing in the language or structure of Title IX creating a private cause of action for retaliation." *Id.* at 19a. Observing that Section 901 of Title IX, 20 U.S.C. § 1681, does not in terms mention retaliation, the court concluded that the absence of an express reference to retaliation "weighs powerfully against a finding that Congress intended Title IX to reach retaliatory

conduct." *Id.* at 20a. As for Section 902, 20 U.S.C. § 1682, the court reasoned that it is "devoid of 'rights-creating' language of any kind" and therefore sheds no light on "what harm Title IX is meant to remedy." *Id.* at 21a. Moreover, the court stated, Section 902's provision of an administrative enforcement mechanism strongly counsels against inferring a private right of action against retaliation "because '[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Id.* (quoting *Sandoval*, 532 U.S. at 290). The court also dismissed the relevance of the Department of Education regulation, reasoning that, because "Congress has not created a right through Title IX to redress harms resulting from retaliation, 34 C.F.R. §100.7(e) may not be read to create one either." *Id.* at 23a. The court thus concluded that Congress did not intend Title IX "to prevent or redress" retaliation and that petitioner therefore has no cause of action. *Id.* at 22a.

Although that conclusion was enough to dispose of the case, the court went on to state that, "even if Title IX did aim to prevent and remedy retaliation," its protection would not extend to those who, like petitioner, suffer reprisal because they complain about discrimination against others. Pet. App. 23a. The court reasoned that "there is quite simply *no* indication of any kind that Congress meant to extend Title IX's coverage to individuals other than direct victims of gender discrimination." *Id.* at 24a.

5. Petitioner sought panel rehearing and rehearing en banc, but the court of appeals denied his request. Pet. App. 34a-35a. Petitioner then sought this Court's review, and the Court granted his petition for a writ of certiorari. 124 S. Ct. 2834 (2004).

SUMMARY OF ARGUMENT

The broad ban on "discrimination" "on the basis of sex" in Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, encompasses a prohibition on retaliating against someone because that person has complained about sex discrimination. And this Court has long held that there is a private right of action to redress discrimination prohibited by Title IX. The court of appeals therefore erred in concluding that petitioner failed to state a valid claim for redress under Title IX.

The text of Title IX broadly prohibits sex-based "discrimination" regardless of the form that the discrimination takes. 20 U.S.C. § 1681. Discriminatory conduct is included in the statutory prohibition unless it falls within one of nine carefully delineated exceptions. Retaliation is simply one variant of discrimination – conduct that treats certain people differently and less favorably than others – and it is not excepted from Title IX's coverage. Further, retaliation is "on the basis of sex" when it is triggered by a complaint about sex-based discrimination. *Id.*

That interpretation of Title IX's text accords with the general rule that broad statutory bans on discrimination are construed to include prohibitions on retaliation. This Court established that principle in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and the courts of appeals have applied it to a wide range of civil rights statutes. That same rule of construction should apply in reading Title IX.

Indeed, *Sullivan* was decided just three years before Congress passed Title IX, so Congress was aware that Title IX's broadly worded ban on discrimination would be understood, like the discrimination ban in *Sullivan*, to encompass a prohibition on retaliation. Moreover, Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, and that statute had consistently been interpreted, in regulations issued by the Department of

Health, Education, and Welfare before Title IX was enacted, to encompass a ban on retaliation.

Reading Title IX to prohibit retaliation is critical if the statute is to achieve its underlying purposes. Congress enacted Title IX both to eliminate federal funding of sex discrimination in educational programs and activities and to provide effective protection for those who might be victimized by that discrimination. Neither purpose can be effectively accomplished if the victims of discrimination and others are deterred from bringing discriminatory treatment to light because they are afraid of reprisal.

The authoritative agency regulations interpreting Title IX confirm that the statute prohibits retaliation for complaining about sex discrimination. If there were any ambiguity about the correct construction of Title IX, the Court would owe those regulations deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). In fact, the interpretation of Title IX reflected in the regulations is entitled to special weight, even apart from ordinary *Chevron* deference, because Congress had a unique opportunity to review the regulations before they first took effect.

The court of appeals' contrary holding flows from a clear misunderstanding about the relevance to this case of the Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). *Sandoval* held that there is no private right of action to enforce the prohibition on disparate impact discrimination created by regulations promulgated under Title VI because Title VI itself prohibits only intentional discrimination. That holding is inapposite here. The anti-retaliation regulations under Title IX do not provide protection beyond what the statute itself provides; rather, they interpret Title IX's core prohibition on discrimination. This case does not require the Court to recognize a new or expanded right of action under the regulations; instead, petitioner invokes only the right of

action to enforce Title IX's core protection that this Court recognized more than a quarter century ago in *Cannon*. The only question in this case is whether Title IX itself prohibits retaliation, and *Sandoval* does not speak to that question at all.

The court of appeals was also incorrect to suggest that retaliation victims like petitioner are not protected by Title IX when they have suffered reprisal for complaining about discrimination against others rather than against themselves. There is no basis in Title IX's text, implementing regulations, or purposes, nor any precedent, for the court of appeals' proposal that the statute's protection should be limited to "direct victims" of discrimination. In fact, there is no clear line between "direct" and "indirect" victims, and requiring courts to draw that distinction would unnecessarily distract them from Title IX's goal of providing effective protection for all victims of sex discrimination. Moreover, although the court of appeals assumed, without analysis, that petitioner is not a "direct victim," petitioner alleged and is entitled to the opportunity to prove that he was directly harmed by the discriminatory treatment about which he complained. Thus, the court of appeals' alternative holding – even if it were correct (which it is not) – would not justify the court's dismissal of petitioner's complaint.

ARGUMENT

TITLE IX PROVIDES REDRESS FOR THOSE WHO SUFFER RETALIATION BECAUSE THEY COMPLAIN ABOUT SEX DISCRIMINATION

This case is about the substantive scope of Title IX, not about whether to recognize a new or expanded private right of action under the statute. The central question in the case is whether Title IX's broad ban on "discrimination" on "the basis of sex," 20 U.S.C. § 1681(a), encompasses a prohibition on retaliation against someone for complaining about sex discrimination. Petitioner submits that it does and

that the private right of action that this Court recognized a quarter century ago in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), accordingly includes redress for retaliation.

Cannon has already definitively established that there is a private right of action to enforce Title IX's ban on sex discrimination. 441 U.S. at 688-89; *see Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). Therefore, if Title IX's anti-discrimination mandate includes a prohibition on retaliation, or if regulations implementing Title IX have reasonably construed it to include such a prohibition, then the private right of action recognized in *Cannon* provides redress for retaliation. *Sandoval*, 532 U.S. at 284.

Because this case, properly understood, is simply about the scope of a statutory right long recognized as redressible by a private cause of action, this Court's jurisprudence concerning when statutes may be construed to create such private rights of action – including the holding in *Sandoval* – is of little relevance. The court of appeals misunderstood that fundamental point, and that misunderstanding led the court to the erroneous conclusion that petitioner has no judicial remedy for the discrimination he suffered.

The court of appeals should have resolved this case by looking to the text, background, and purposes of Title IX, all of which indicate that the statutory ban on discrimination includes a prohibition on discrimination that takes the form of retaliation. That interpretation of the statute is confirmed by its implementing regulations, which have consistently and uniformly reflected the position that Title IX prohibits retaliation.

Indeed, it hard to imagine how Congress could have intended otherwise. Major anti-discrimination statutes, whether or not they expressly addresses retaliation, have been construed to prohibit retaliation. Those constructions reflect a widespread recognition that an anti-discrimination mandate cannot be effective unless those who invoke its

protections are safe from reprisal. This Court should therefore construe Title IX in accord with other anti-discrimination statutes and hold that its prohibition on sex discrimination includes a prohibition on retaliating against someone for complaining about sex discrimination.

I. TITLE IX PROHIBITS RETALIATION AGAINST THOSE WHO COMPLAIN ABOUT SEX DISCRIMINATION

A. The Text Of Title IX Prohibits "Discrimination" "On The Basis Of Sex," Including Discrimination That Takes The Form Of Retaliation

1. Title IX commands that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). That prohibition is phrased in sweeping language, and it is accordingly construed expansively. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (courts "must accord" Title IX "a sweep as broad as its language") (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

Title IX broadly prohibits discrimination in which sex plays a role without regard to the form that the discrimination takes. The statute bans all such differential treatment – "exclu[sion] from participation," "deni[al]" of "benefits," and any other kind of "discrimination" – in or under "any" education program or activity receiving federal funding. 20 U.S.C. § 1681(a). Congress clearly understood the breadth of that anti-discrimination mandate, because it took care to specify with precision the conduct that it wanted to exclude from Title IX's coverage. The expansively phrased prohibition on discrimination is followed by a list of nine detailed exceptions. *See id.* (exempting, for example, certain categories of educational institutions; membership practices of certain fraternities, sororities, and youth service

organizations; and certain single sex scholarships for higher education). That structure indicates that Congress intended to prohibit *all* types of discrimination except for the particular forms of discrimination expressly excepted from Title IX's coverage. *See North Haven*, 456 U.S. at 521-22 (reasoning that employment discrimination is covered under Title IX because it is not among the listed exceptions).

Retaliation is simply one variant of discrimination – conduct that treats certain people differently and less favorably than others. *See Olmstead v. L.C., by Zimring*, 527 U.S. 581, 614 (1999) (stating that the "normal definition of discrimination" is "differential treatment of similarly situated groups"); *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 680 n.22 (1983) (defining discrimination as "less favorable" treatment). Singling someone out for reprisal because he or she has complained about discrimination is itself discrimination. *See, e.g.*, 38 U.S.C. § 516(d) (describing "retaliation" as a form of "discrimination"). Retaliation is therefore prohibited by Title IX, just as other forms of discrimination are prohibited when they are not excepted from the statute's coverage. Thus, just as employment discrimination and sexual harassment are encompassed within Title IX's prohibition, *North Haven*, 456 U.S. at 530; *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75 (1992), so too is retaliation.

2. It has long been established by decisions of this Court and the courts of appeals that a broad statutory ban on discrimination like the one in Title IX encompasses a prohibition on retaliation. That approach to construing anti-discrimination statutes reflects the fact that retaliation bears "a symbiotic and inseparable relationship" to primary discrimination. *Peters v. Jenney*, 327 F.3d 307, 318 (4th Cir. 2003).

The landmark decision holding that a statutory prohibition on discrimination includes a prohibition against

retaliation is *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), which was decided just three years before the enactment of Title IX. In *Sullivan*, the Court held that 42 U.S.C. § 1982, which prohibits discrimination in property transactions, also protects from retaliation those who complain about such discrimination.[2] Although Section 1982 makes no reference to retaliation, the Court concluded that it protected Sullivan, a white man expelled from membership in a community park because he protested the refusal to allow him to assign one of his membership shares to Freeman, a black man to whom he had rented a house. The Court explained that, if the expulsion "can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." 396 U.S. at 237.

Consistent with *Sullivan*, the federal courts of appeals have routinely held that statutes that prohibit discrimination encompass a ban on retaliation even when they do not contain express anti-retaliation provisions. For example, the courts of appeals – including the court below – have concluded that 42 U.S.C. § 1981, which prohibits discrimination in contracting, provides redress for retaliation. *See, e.g.*, *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 339 (5th Cir. 2003); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2d Cir. 1998); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1412-13 (11th Cir. 1998);

[2] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 259 (8th Cir. 1996).[3]

The same is true of the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, and the Age Discrimination in Employment Act, 29 U.S.C. § 633a, which broadly prohibit "discrimination" in federal employment. Those provisions do not expressly address retaliation, but the courts of appeals have construed them to ban retaliation. *See, e.g., Forman v. Small*, 271 F.3d 285, 296-97 (D.C. Cir. 2001) (ADEA); *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (Title VII); *Brown v. Brody*, 199 F.3d 446, 452-53 (D.C. Cir. 1999) (Title VII); *Brower v. Runyon*, 178 F.3d 1002, 1005 (8th Cir. 1999) (Title VII); *Sweeney v. West*, 149 F.3d 550, 554 (7th Cir. 1998) (Title VII); *DeNovellis v. Shalala*, 135 F.3d 58, 63 n.2 (1st Cir. 1998) (implicitly recognizing ADEA claim); *Bornholt v. Brady*, 869 F.2d 57,

[3] Section 1981 provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of the all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981. Before this Court's decision in *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), the courts of appeals had uniformly held that Section 1981 broadly prohibits retaliation for complaining about discrimination in contracting. *See, e.g., Choudhury v. Polytechnic Inst. of N.Y.*, 735 F.2d 38, 42-44 (2d Cir. 1984); *Setser v. Novack Inv. Co.*, 638 F.2d 1137, 1146-47 (8th Cir.), *modified on other grounds*, 657 F.2d 962 (1981); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977). *Patterson*'s holding that Section 1981 did not address conduct after contract formation called into question the breadth of Section 1981's anti-retaliation protection, but courts continued to hold that at least some retaliation claims survived *Patterson*. *See Andrews*, 140 F.3d at 1410, 1412. Following enactment of the Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, § 101, 105 Stat. 1071-72, the courts of appeals have once again uniformly held that Section 1981 encompasses a broad prohibition on retaliation, as illustrated by the cases cited in the text above.

62 (2d Cir. 1989) (stating in dictum that ADEA claim exists); *Canino v. EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983) (Title VII); *Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981) (Title VII).[4]

Similarly, before 1992, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, did not contain an express anti-retaliation provision, but courts had construed its anti-discrimination mandate to include a prohibition on retaliation. *See, e.g., Hoyt ex rel. Siebert v. St. Mary's Rehab. Ctr.*, 711 F.2d 864, 867 (8th Cir. 1983). As amended in 1992, Section 504 incorporates, for claims related to employment discrimination, the express anti-retaliation protection of the Americans with Disabilities Act. *See* 29 U.S.C. § 794(d) (incorporating 42 U.S.C. § 12203). But Section 504 still does not contain express protection from retaliation for other kinds of discrimination complaints. Nonetheless, courts have continued to construe its general anti-discrimination provision to provide that protection. *See, e.g., Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 47-48 (1st Cir. 2000). Finally, in the specific context here, the Eleventh Circuit stands alone in its conclusion that Title IX's prohibition against sex discrimination does not encompass a prohibition against retaliation.[5]

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[4] The Tenth Circuit has assumed that the ADEA prohibits retaliation against federal employees and provides a cause of action to those who suffer retaliation, *see Lujan v. Walters*, 813 F.2d 1051, 1058 (10th Cir. 1987), but that court has also held that the federal government has not waived its sovereign immunity under the statute. *See Villescas v. Abraham*, 311 F.3d 1253, 1258 (10th Cir. 2002).

[5] *See Litman v. George Mason Univ.*, No. 01-2128, 2004 WL 345758, at **1, 92 Fed. Appx. 41, 42 (4th Cir. Feb. 25, 2004) (holding that Title IX authorizes a private right of action to seek damages for retaliation); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002) (establishing standard that must be met for student to prevail on Title IX retaliation claim); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995) (same); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (stating that "[r]etaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX"); *see also Brine v. Univ. of Iowa*, 90 F.3d 271, 272-73 (8th Cir. 1996) (implicitly recognizing that Title IX prohibits retaliation); *Willner v. Budig*, 848 F.2d 1032, 1033 (10th Cir. 1988) (same).

3. The language of Title IX comfortably accommodates the general rule that a broad ban on discrimination encompasses a ban on retaliation. As discussed above, Title IX prohibits all sex "discrimination" and does not anywhere suggest that retaliation is excluded from the discrimination covered by that prohibition. *See* pp. 12-13, *supra*. Moreover, when a recipient of federal funds retaliates against someone because that person has complained about sex discrimination, the recipient has discriminated against the person "on the basis of sex."

The requirement that retaliation be "on the basis of sex" does not mean that sex must be the sole or predominant cause of the retaliatory treatment. All it requires is that sex be a "basis" for the treatment, which means that sex must be a "supporting element" or an "underlying condition" or "circumstance." *See American Heritage Dictionary of the English Language* 150 (4th ed. 2000); *Webster's II New Riverside University Dictionary* 156 (1988); *Black's Law Dictionary* 161 (8th ed. 2004). Thus, sex must have played a role in the events leading to the retaliation or be a factor on which the retaliation rests. That is certainly the case when a recipient of federal funds retaliates against someone because that person has complained about sex discrimination. Sex is a "supporting element" and an "underlying condition" and "circumstance" of the retaliation in two respects: the retaliation was triggered by a complaint about *sex* discrimination, and differential treatment based on *sex* gave rise to that complaint.

4. If the Court were to reject that reading of Title IX and conclude that the statutory language does not encompass a prohibition on retaliation, the result would be widespread disruption of existing civil rights law. First, Title IX is generally construed *in pari materia* with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*, which prohibits discrimination based on "race, color, or national origin" in all programs receiving federal funding. *See Cannon*, 441 U.S. at 695-96. Thus, a holding that Title IX does not prohibit retaliation could be interpreted to suggest that there is also no prohibition on retaliation against those who complain about racial or national origin discrimination in federally funded programs. Moreover, as discussed above, the rule of construction that a general ban on discrimination encompasses a ban on retaliation has been applied to a broad range of anti-discrimination statutes. A rejection of that principle as applied to Title IX would thus call into question the established law that other statutes – such as the Title VII and ADEA provisions prohibiting discrimination in federal employment and Section 504 of the Rehabilitation Act – prohibit retaliation.

The texts of those statutes, like the text of Title IX, broadly prohibit "discrimination" but do not explicitly refer to retaliation. For example, the federal employee provision of Title VII requires that federal employment decisions "be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16. Similarly, the ADEA provision governing federal employment requires that such decisions "be made free from any discrimination based on age." 29 U.S.C. § 633a. And Section 504 of the Rehabilitation Act declares, in language quite similar to Title IX, that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 29 U.S.C. § 794(a).

There is no reason for the Court to risk unsettling the established law that those statutes prohibit retaliation. For the reasons we have described above, those statutes and Title IX all can be read to encompass a prohibition on retaliation. And, in the case of Title IX, that reading of the text is confirmed by consideration of both the legal background against which Congress enacted the statute and the purposes Congress intended Title IX to achieve.

B. The Context Surrounding Title IX's Enactment Confirms That Congress Intended To Prohibit Retaliation

1. When Congress enacted Title IX, it was well aware that sex discrimination in educational programs frequently takes the form of retaliation. Indeed, Congress had heard extensive testimony to that effect in the hearings that preceded Title IX's enactment.

Witnesses testified about the reprisals that students and faculty suffered when they complained about sex discrimination and about how fear of retaliation deterred discrimination victims and others who observed discrimination from complaining. *See Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 91st Cong. 242 (1970) (*1970 Hearings*) (testimony of Dr. Ann Harris) ("[W]omen who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for actions such as outright plagiarism."); *id.* at 302 (statement of Bernice Sandler) ("[I]t is also very dangerous for women students or women faculty to openly complain of sex discrimination on their campus. . . . At a recent meeting of professional women I counted at least four women whose

contracts were not renewed after it became known that they were active in fighting sex discrimination at their respective institutions."); *id.* at 463 (testimony of Daisy Fields) ("[F]ew women have dared to file complaints of sex discrimination" because "[w]e know of a number" of cases in which "women who have filed complaints have suffered reprisals in the form of having their jobs abolished" or "have been reassigned to some degrading position far below their capabilities in anticipation they might resign."); *id.* at 588 (statement of Women's Rights Comm'n of New York Univ. Sch. of Law) ("It was recently discovered that one woman had tried to get [the dormitory] opened up ten years ago, when the whole building . . . was closed to women. She raised a complaint at a faculty meeting about this situation; blackballing letters written by faculty members were subsequently placed in her employment file at the law school without her knowledge.").

Congress also had before it documents describing retaliatory discrimination faced by those who complained about sex discrimination. *1970 Hearings* at 1051 (reprinting *Samuel Stafford, Women on the March Again – Are They Being Discriminated Against in White-Collar Federal Jobs*, Gov't Executive, June 1969) ("A few [women] fight back – and pay the penalty for bucking the male dominated system."); 118 Cong. Rec. 5812 (1972) ("[O]n some campuses it is still dangerous to fight sex discrimination. I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such discrimination.").

2. Congress was not only aware that retaliatory discrimination was a problem but also understood that it would make such retaliation unlawful by enacting Title IX's general prohibition on discrimination based on sex. As this Court noted in *Cannon*, Congress enacted Title IX against the backdrop of the "recently issued" decision in *Sullivan*. 441 U.S. at 698 n.22. "[I]t is not only appropriate but also

realistic to presume that Congress was thoroughly familiar with" that "unusually important precedent[] . . . and that it expected its enactment to be interpreted in conformity with [it]." *Id.* at 699. Thus, Congress presumably intended the broad prohibition on discrimination in Title IX to encompass a prohibition on retaliation, just as this Court in *Sullivan* had read the broad prohibition on discrimination in Section 1982 to encompass such a prohibition.

Moreover, as this Court has repeatedly recognized, Congress modeled Title IX on Title VI of the Civil Rights Act of 1964. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Cannon*, 441 U.S. at 694. Consequently, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon*, 441 U.S. at 696. During those eight years, HEW had consistently construed the anti-discrimination mandate of Title VI to include a prohibition on retaliation. That interpretation was reflected in the implementing regulations that HEW first promulgated in 1964 and that remained in place when Congress enacted Title IX. *See* 29 Fed. Reg. 16,298, 16,301 (1964) (promulgating 45 C.F.R. § 80.7(e) ("Intimidatory or retaliatory acts prohibited")); 45 C.F.R. § 80.7(e) (1971).

HEW had applied the regulation's interpretation of Title VI in the high profile context of school desegregation. In 1966, HEW had issued guidelines stating that Title VI required school districts to refrain from retaliating against, and to protect from retaliation, black students who exercised their rights to attend previously all-white schools under recently established "freedom of choice" plans. *See* 31 Fed. Reg. 5623, 5624, 5626, 5628 (1966) (45 C.F.R. §§ 181.17(c) and 181.52). School districts were required to issue public notices stating, in language that closely paralleled the anti-retaliation regulation, that it was unlawful to "intimidate, threaten, coerce, retaliate or discriminate against any

individual for the purpose of interfering with the free making of a choice of school." *See id.* at 5633 (Attachment 5 ¶17).

The United States Court of Appeals for Fifth Circuit, in a prominent en banc decision, had upheld the HEW guidelines as complying "with the letter and spirit of the Civil Rights Act of 1964." *See United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385, 390 (5th Cir. 1967) (en banc). And the court of appeals had incorporated the guidelines, including the anti-retaliation provisions, into a model decree that covered all school districts in the circuit. *Id.* at 392. Thus, the legal context in which Title IX was enacted makes clear that Congress intended the statute, like Title VI of the Civil Rights Act, to prohibit retaliation.

C. Reading Title IX To Prohibit Retaliation Is Critical To Achieving The Statute's Purposes

It is even clearer that Congress intended Title IX to prohibit retaliation when one considers the purposes that Congress was trying to achieve in enacting the statute. Congress "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Title IX could not achieve either of those objectives if recipients of federal funds felt free to retaliate against those who complain about sex discrimination.

1. Individuals cannot enjoy meaningful protection against sex discrimination unless there is an effective mechanism to enforce a legal prohibition on discrimination. And an enforcement regime cannot be effective unless victims and others who observe discrimination are willing to assert the right to be free from discriminatory treatment. But those individuals will not be willing to assert that right if they have no effective remedy against reprisal.

Without effective protection against retaliation, a discrimination victim could never fully vindicate his or her rights. Even if the victim protested and ultimately obtained judicial redress for an initial act of discrimination, that redress would be of little value because the same discriminatory treatment (or worse) could be imposed as reprisal for the initial complaint. After one or two victims complained and suffered retaliation, future victims – and others who observed discrimination – would be unlikely to complain for fear of ending up in a worse position than if they had remained silent.

This Court invoked similar concerns in *Sullivan* in explaining why Section 1982 protects from retaliation those who "try[] to vindicate the rights of minorities" under that statute. *See Sullivan*, 396 U.S. at 237 (explaining that, if retaliation were lawful, that would "give impetus to the perpetuation of" the primary discrimination prohibited by Section 1982). The concerns that animated the Court in *Sullivan* apply with equal force here. *See* United States Department of Justice, *Title IX Legal Manual* (*DOJ Title IX Manual*) 70 (Jan. 11, 2001) <http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf> (interpretive manual for federal agencies) (reasoning that, without retaliation protection, the underlying prohibition on sex discrimination could not be effective).

2. Protection against retaliation is also critical to achieving Congress's goal of avoiding the use of federal resources to support discriminatory practices. That goal too depends on the willingness of those who suffer or observe discrimination to report it. If discrimination remains hidden, then the federal government will continue to subsidize the discrimination, unaware that it is doing so.

Research shows that retaliation remains an obstacle to rooting out discrimination even with the existing prohibitions against it. *See* Floyd D. Weatherspoon, *Don't Kill the Messenger: Reprisal Discrimination in the Enforcement of*

Civil Rights Laws, 2000 L. Rev. M.S.U.-D.C.L. 367, 369, 383 & n.88, 394 n.155 (discussing reprisal against employees who have responsibility for ensuring equal employment opportunity); Louise F. Fitzgerald, *et al.*, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. Soc. Issues 117, 122 (1995) ("The most common reason [women do not report workplace harassment] . . . is fear – fear of retaliation. . . . Unfortunately, such beliefs are often well-founded."); Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 Employee Rts. & Employment Pl'y J. 549, 586-87 (2001) (noting that only between 12 and 20 percent of harassed employees ever report the misconduct and that "studies demonstrate that nearly 70 percent of female employees questioned about their failure to report sexual harassment in the workplace considered the potential for retaliation to be a moderate or strong influence on their decision"). The problem would be far more serious if there were no prohibition on retaliation.

Moreover, protection from retaliation is particularly important in the context of the educational programs and activities covered by Title IX (and its sister statute Title VI). Resolving discrimination complaints through internal conciliation and voluntary compliance is desirable in the educational setting. Those resolution mechanisms can minimize disruption of the educational process. They also can increase the likelihood that problems will be corrected promptly so that students can benefit from the corrective measures before they move on to other schools or graduate.

Internal conciliation and voluntary compliance are impossible, however, without strong protection against retaliation. There can be no voluntary resolution of discrimination complaints unless victims of discrimination

and others who observe it are willing to bring it to the attention of personnel who can investigate and take corrective action. But neither discrimination victims nor others will risk alerting those in authority to discriminatory treatment unless they are secure that they are protected against reprisal. Thus, absent vibrant retaliation protection, the result will be less conciliation and voluntary compliance and more litigation, a result that is certainly counterproductive.

The problems inherent in a failure to protect against retaliation are underscored in the case of those who suffer sexual harassment. In that context, the Court has held that a victim of harassment cannot bring a suit to recover damages unless an official of the recipient entity with authority to take corrective action had actual notice of the harassment and failed to take corrective action. *See Gebser*, 524 U.S. at 290. It would make no sense to require the victim of harassment to alert an official in authority if that official was then free ~~to~~ retaliate against the victim for seeking corrective action.

3. Not only is protection against retaliation vital to the integrity of Title IX's core prohibition on sex discrimination, but the costs of prohibiting retaliation are minimal. A recipient of federal assistance has no legitimate interest in retaliating against those who complain about unlawful discrimination. Moreover, retaliation is, by its very nature, an intentional and official act of the recipient entity that can only be carried out by someone acting with authority. It is thus entirely appropriate to hold the recipient accountable for the retaliation.[6]

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[6] Because retaliation is itself an intentional act, the Fourth Circuit was incorrect in *Peters*, 327 F.3d at 319, when it stated that an individual can assert a retaliation claim under Title VI (and thus presumably under Title IX as well) only if the complaint triggering the retaliation is also about intentional discrimination. On the contrary, as the Fourth Circuit recognized elsewhere in its opinion, *see id.* at 320-21, all that is

Furthermore, experience shows that retaliation claims under Title IX have not posed an undue burden on either the administrative resolution process or the federal court system. The Office for Civil Rights of the Department of Education has received an average of fewer than 85 such complaints each year for the last ten years. *See* Letter from Alice B. Wender, Director, District of Columbia Office for Civil Rights, United States Department of Education, to Nicole Birch, O'Melveny & Myers, LLP (July 1, 2004) (reprinted in Appendix to Brief of Amicus Curiae New York Lawyers for the Public Interest *et al.* Supporting Petitioner). And most of those complaints have not ended up in court. In the more than 30 years since Title IX was enacted, there have been only about 125 reported cases in which the plaintiffs raised retaliation claims.[7]

D. Title IX's Implementing Regulations, Which Interpret The Statute To Prohibit Retaliation, Are Entitled To Deference

For the reasons set out above, Title IX's text, considered along with the well-established anti-discrimination case law, the legal background against which Title IX was enacted, and Congress's purposes in enacting it all make clear that Title IX prohibits retaliation. If there remained any

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necessary is that the complainant have acted "in good faith and *with a reasonable and sincere belief that he or she is opposing unlawful discrimination.*" *Talanda v. KFC Nat'l Mgmt.*, 140 F.3d 1090, 1096 (7th Cir. 1998) (quoting *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1459 (7th Cir. 1995)) (retaliation standard under Title VII and ADA). That remains true whether the discrimination is made unlawful by the statute itself or by federal regulations effectuating the statute. The Court need not address that question here, however, because petitioner complained about intentional discrimination – respondent's provision of unequal funding and facilities to the girls' basketball team.

[7] A search of all state and federal cases contained in the Westlaw database for the terms "Title IX" & "retaliat!" yielded fewer than 125 cases in which some sort of retaliation claim was brought under Title IX.

ambiguity at all about whether the "discrimination" prohibited by Title IX includes retaliation, that ambiguity would be resolved by the regulations that federal agencies providing educational funding have adopted to implement the statute. Those implementing regulations uniformly interpret Title IX to prohibit retaliation. That interpretation is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Indeed, the Title IX regulations should be given especially great weight because they were submitted for congressional review, and Congress allowed them to take effect without modification.

1. Each federal agency that disburses federal financial assistance is charged with enforcing Title IX for its recipients, and each agency has express authority to promulgate regulations to effectuate Title IX's ban on discrimination. 20 U.S.C. § 1682. As a historical matter, however, HEW and its successor agency, the Department of Education, have been the primary enforcers of Title IX.

HEW first promulgated regulations implementing Title IX in 1975, shortly after the statute was enacted. Those regulations adopted by cross-reference an existing Title VI regulation that interpreted the statutory ban on discrimination to bar retaliation. *See* 40 Fed. Reg. 24,128, 24,136, 24,144 (1975) (promulgating 45 C.F.R. § 86.71 (1975), which incorporated by reference 45 C.F.R. § 80.7(e) (1975)). The current regulations are substantively identical to the initial regulations. *See* 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7(e)). The regulation addressing retaliation is entitled "Intimidating or retaliatory acts prohibited." It provides that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [20 U.S.C. § 1681] or this part, or because he has made a complaint, testified, assisted, or participated in any manner

in an investigation, proceeding or hearing under this part." 34 C.F.R. § 100.7(e). That regulation reflects the Department of Education's view that "retaliation is prohibited by Title IX." 62 Fed. Reg. 12,034, 12,044 (1997).

In addition, since 1980, the Department of Justice (DOJ) has been charged by Executive Order with responsibility to "coordinate the implementation and enforcement by Executive agencies" of Title IX. 45 Fed. Reg. at 72,995. In the exercise of that responsibility, DOJ has adopted the same retaliation regulation as the Department of Education, and it has coordinated the promulgation of substantively identical regulations by 20 other federal agencies. *See* 65 Fed. Reg. at 52,858. Those common regulations reflect the view that retaliation is one of the "general types of prohibited discrimination" under Title IX. *DOJ Title IX Manual, supra,* at 57.[8]

The regulations reflect the uniform view of the federal agencies authorized to promulgate regulations effectuating Title IX. Moreover, the regulations were adopted under an express grant of rulemaking authority after public notice and comment. They are therefore entitled to *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). Because the regulations are a reasonable reading of Title IX for all the reasons we have described above, *see* pp.

[8] Several other agencies have independently adopted Title IX regulations. Those regulations all contain provisions identical to the anti-retaliation provision promulgated by the Departments of Education and Justice. *See* 7 C.F.R. § 15a.71 (regulation promulgated by the Department of Agriculture, incorporating by reference 7 C.F.R. § 15.7); 10 C.F.R. § 5.605 (regulation promulgated by the Department of Energy, incorporating by reference 10 C.F.R. § 4.45); 45 C.F.R. § 86.71 (regulation promulgated by the Department of Health & Human Services and adopted by the National Endowment for the Arts and the National Endowment for the Humanities, incorporating by reference 45 C.F.R. § 80.7(e)).

12-26, *supra*, they are entitled to controlling weight. *See Mead*, 533 U.S. at 229 (citing *Chevron*).

Indeed, this Court, recognizing the Department of Education's historical role as the agency primarily responsible for administering Title IX, has previously deferred to the Department's reading of the statute. *See Cannon*, 441 U.S. at 706, 708 & n.42; *cf. North Haven*, 456 U.S. at 522 n.12 (declining to defer to a particular interpretation of Title IX because the interpretation was in flux); *see also* 65 Fed. Reg. at 52,859 (noting that the Department of Education regulations were used as model for the common regulations because of the Department's role as the lead agency in Title IX enforcement). DOJ's view is also entitled to great weight because of its responsibility for coordinating government-wide enforcement of Title IX. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979).

2. The interpretation of Title IX reflected in the regulations is entitled to special weight, even apart from ordinary *Chevron* deference, because Congress had a unique opportunity to review and approve the regulations. Section 431(d)(1) of the General Education Provisions Act required HEW to submit the regulations to Congress before they took effect. *See* Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 567 (formerly codified at 20 U.S.C. § 1232(d)(1) (Supp. IV 1974)). Congress had 45 days to review the regulations and could disapprove them by a concurrent resolution if it found them "inconsistent with the Act." *Id.*

Congress diligently reviewed the Title IX regulations, including the anti-retaliation provision, to ensure that the regulations were consistent with the statute. The Subcommittee on Postsecondary Education of the House

Committee on Education and Labor held six days of hearings to evaluate the regulations. Representative O'Hara, the Chair of the House Subcommittee conducting the hearings, stated the Subcommittee's charge as follows:

> The regulations will be reviewed solely to see if they are *consistent with the law and with the intent of the Congress* in enacting the law. We are not meeting to decide whether or not there should be a Title IX but solely to see if the regulation writers have read Title IX and understood it the way the lawmakers intended it to be read and understood.

Sex Discrimination Regulations: Hearing Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor, 94th Cong. 1 (1975) (emphasis added). The House Subcommittee on Equal Opportunities likewise held a hearing to determine whether the regulations accorded with Congress's intent in enacting Title IX. *Hearing on House Concurrent Resolution 330 (Title IX Regulation) Before the Subcomm. on Equal Opportunities of the House Comm. on Educ. and* Labor, 94th Cong. (1975).

Members of Congress introduced no fewer than six resolutions that would have disapproved the Title IX regulations, but Congress passed none of the proposed resolutions. *North Haven*, 456 U.S. at 533-34 n.24. By deciding not to block implementation of the regulations, Congress confirmed that they were, in the words of the House Subcommittee Chair, "consistent with the law and with the intent of Congress." *Sex Discrimination Regulations*, *supra*. Thus, as this Court has previously recognized, the regulations – including the anti-retaliation regulation – took effect with implicit congressional approval. *North Haven*, 456 U.S. at 533-34.

Furthermore, after the regulations took effect, Congress revisited Title IX several times, making significant substantive amendments in 1976 and 1988. *See* Education

Amendment of 1976, Pub. L. No. 94-482, Title IV, § 412(a), 90 Stat. 2234; Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28. In neither of those amendments did Congress express any disapproval of the agency's reading of the statute to prohibit retaliation.

Although post-enactment developments of this sort are not dispositive, this Court has recognized, in discussing the Title IX regulations themselves, that "[w]here 'an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.'" *North Haven*, 456 U.S. at 535 (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940))). The legislative intent has been correctly discerned here. As reflected in the longstanding regulations that Congress has consistently declined to overturn, Title IX prohibits retaliation against those who complain about sex discrimination.[9]

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[9] The Solicitor General agrees with petitioner that Title IX prohibits retaliation but takes a somewhat narrower view than petitioner of the scope of the prohibition. The Solicitor General argues that someone who suffers retaliation for complaining about sex discrimination would not have redress if the employer retaliated not only against that person but also against all complainers. Br. for the United States as Amicus Curiae at 6. This case does not require the Court to choose between petitioner's and the government's views of the precise contours of the retaliation protection, because the court of appeals held that the statute provides *no retaliation protection of any kind*. Moreover, petitioner's allegation that he "was subjected to adverse terms of employment *because of* gender discrimination" (J.A. 11 (emphasis added)) states a claim even under the government's view. Thus, reversal of the court of appeals is required under both petitioner's and the government's positions.

If the Court nonetheless chooses to address the issue, it should reject the narrow reading of the retaliation protection proposed by the Solicitor

E. The Contrary Arguments On Which The Court Of Appeals Relied Are Unpersuasive

1. The primary reason offered by the court of appeals for concluding that Title IX does not prohibit retaliation was that such a conclusion is dictated by this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See, e.g.*, Pet. App. 8a (stating that "[o]ur analysis of [petitioner's] claim is governed in substantial measure by" *Sandoval*); *id.* at 9a ("*Sandoval*'s interpretation of Title VI powerfully informs our reading of Title IX"); *id.* at 10a-17a (describing *Sandoval* in detail); *id.* at 17a (calling *Sandoval* a "template" for the court's analysis). But *Sandoval* – a case about whether private parties may invoke Title VI to obtain redress for disparate impact discrimination – has no bearing on the central question in this case – whether Title IX prohibits retaliation.

In *Sandoval*, the Court held that Title VI regulations that prohibit discriminatory effects cannot be privately enforced. The Court reasoned that, because Title VI itself prohibits only intentional discrimination, it is "clear that the private right of action to enforce [Title VI] does not include a private right to enforce [disparate impact] regulations." 532 U.S. at 285. *Sandoval* thus holds that there can be no implied cause

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General. That reading would be a sharp break from existing civil rights law. We are not aware of any reported decision holding that a victim of retaliation was not protected because the retaliator targeted all those who complained rather than only those who complained about the particular discrimination suffered by the victim. Moreover, limiting the retaliation protection in that way would seriously compromise its effectiveness: victims of discrimination will be deterred from complaining if a discriminator retaliates against them – whether or not the discriminator also retaliates against other complainers. The new limit on retaliation proposed by the government is thus at odds with the very reason retaliation is prohibited in the first place. *See generally* Brief of Amicus Curiae New York Lawyers for the Public Interest *et al.* Supporting Petitioner (discussing this issue in detail).

of action for conduct that is permissible under a statute, even when such a right might be implied by agency regulation. *See id.* at 290-91.

Sandoval's holding is inapposite here because petitioner does not rely on federal regulations that have extended Title IX's protection beyond the protection provided by the statute. Rather, petitioner invokes only the core protection provided by Title IX itself and relies on the right of action to enforce that protection that this Court recognized more than a quarter century ago in *Cannon*. The disputed issue in this case is whether Title IX itself prohibits retaliation. And *Sandoval* does not speak to that question. Instead, that question is resolved, as discussed above, by looking to the text, purposes, and background of Title IX, all of which show that Title IX's prohibition on discrimination on the basis of sex encompasses a ban on retaliation.

It is true that, as described above, federal agency regulations provide that Title IX prohibits discrimination. *See* pp. 27-28, *supra*. But Title IX would prohibit retaliation even if those regulations did not exist. The Title IX anti-retaliation regulations, unlike the regulations at issue in *Sandoval*, do not extend the protection of Title IX beyond its terms. Rather, as the Solicitor General explained in his amicus brief in support of the petition for a writ of certiorari, the regulations reflect an "interpretation of the terms of Title IX itself." Br. for the United States as Amicus Curiae at 11. *Sandoval* in no way suggests that the existence of regulations of that sort precludes application of a private right of action. On the contrary, *Sandoval* confirms that regulations like the ones here, which "authoritatively construe the statute itself," may be privately enforced. 532 U.S. at 284 (citation omitted). That is because, when Congress "intends a statute to be enforced through a private cause of action it intends the

authoritative interpretation of that statute to be so enforced as well." *Id.*[10]

2. In addition to relying on *Sandoval*, the court of appeals relied on a purported negative implication of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. The court reasoned that Title VII expressly prohibits retaliation by private employers, so the absence of a similar provision in Title IX "may indicate" that Title IX does not cover retaliation. Pet. App. 20a n.12. That reasoning is incorrect.

The court of appeals' reasoning ignores a crucial difference between the language and structures of Title IX and Title VII. In contrast to the broadly worded prohibition on discrimination in Title IX, Title VII spells out in detail the specific forms of conduct that violate the statute. *Compare* 20 U.S.C. § 1681 *with* 42 U.S.C. §§ 2000e-2, 2000e-3.[11]

[10] The degree to which the court of appeals went off track because of its reliance on *Sandoval* is illustrated by the court's reasoning that, under *Sandoval*, the administrative remedies provided by 20 U.S.C. § 1682 "strongly counsel[] against inferring a private right of action against retaliation." *See* Pet. App. 21a. This Court in *Cannon* already considered the import of those administrative remedies for the existence of a right of action to enforce Title IX's prohibition on discrimination. The Court concluded that the existence of a right of action is fully consistent with the administrative remedies. *See Cannon*, 441 U.S. at 693-94. There was no reason for the court of appeals to revisit that conclusion in this case, because petitioner seeks to rely only on the cause of action that this Court recognized in *Cannon*. This case does not require the expansion of that cause of action nor recognition of a new one based on other provisions of Title IX or the implementing regulations.

[11] For example, in addition to addressing retaliation (42 U.S.C. § 2000e-3(a)), Title VII also specifically addresses the illegality of discrimination in hiring and discharge (42 U.S.C. § 2000e-2(a)(1)); discrimination in compensation, terms, conditions, or privileges of employment (42 U.S.C. § 2000e-2(a)(1)); discrimination effected by limiting, segregating, or classifying employees or applicants for employment in different ways (42 U.S.C. § 2000e-2(a)(2)); discrimination by employment agencies (42 U.S.C. § 2000e-2(b)); discrimination by labor organizations (42 U.S.C. § 2000e-2(c)); discrimination in training programs (42 U.S.C. § 2000e-2(d)); and discriminatory use of test scores (42 U.S.C. § 2000e-2(l)).

Because Congress did not mention any specific discriminatory practices in delineating Title IX's prohibition on discrimination, the failure to mention one particular practice, such as retaliation, says nothing about whether that practice is permissible.

The court of appeals' reasoning also ignores that Title VII itself has been construed to prohibit retaliation even where it does not expressly do so. As noted above, when Title VII was amended to reach federal employees in 1972, Congress did not specifically incorporate the anti-retaliation provision into that new section. *See* 42 U.S.C. § 2000e-16. Despite the absence of any language in Section 2000e-16 addressing retaliation, the courts of appeals have uniformly held that its general prohibition on discrimination protects federal workers against retaliation. *See* pp. 15-16, *supra* (citing cases).

The court of appeals' reasoning also cannot be reconciled with the established principle that a broad ban on "discrimination" includes a ban on retaliation. As described above, that principle has been uniformly applied across the range of anti-discrimination statutes, and it is particularly applicable to Title IX because Title IX was enacted soon after *Sullivan*, the landmark decision of this Court applying the principle. *See* pp. 13-16, *supra*. Thus, whatever Congress may have believed about whether a ban on discrimination would include a ban on retaliation when it enacted Title VII in 1964, Congress knew that a broad discrimination prohibition would include a retaliation prohibition when it enacted Title IX in 1972 in the wake of the *Sullivan* decision. The court of appeals erred in holding to the contrary.

II. TITLE IX'S PROHIBITION ON RETALIATION INCLUDES PROTECTION FOR THOSE WHO COMPLAIN ABOUT SEX DISCRIMINATION AGAINST OTHERS

The court of appeals also rested its dismissal of petitioner's complaint on the alternative holding that, even if Title IX protects against retaliation, that protection does not extend to those who are not themselves "direct victims" of sex discrimination. Pet. App. 23a. The court's proposed distinction between "direct victims" and "those who care for, instruct, or are affiliated with them" (*id.*) is untenable. Once one acknowledges that Title IX protects against retaliation, there is no basis in the statute's text, implementing regulations, or purposes, nor any precedent, for limiting its protection to those who have complained about discrimination against themselves rather than others.

Moreover, as this case illustrates, there is no clear line between so-called "direct" and "indirect" victims. Contrary to the court of appeals' assumption that petitioner is not a "direct victim," petitioner alleged and must, at this stage of the case, be presumed to be able to prove that he was directly harmed by the discrimination about which he complained. Thus, the court of appeals' alternative holding – even if it were correct (which it is not) – would not justify dismissal of petitioner's complaint. Instead, it would raise a host of new and difficult questions about who does and does not qualify as a "direct" victim entitled to the full protection of Title IX's ban on retaliation.

A. Title IX's Text And Implementing Regulations Prohibit Retaliation Against Individuals Who Complain About Discrimination Against Others

1. There is no textual basis to confine Title IX's prohibition against retaliation to so-called "direct victims" of discrimination. The prohibition on retaliation flows from the statute's prohibition against "discrimination" "on the basis of

sex." 20 U.S.C. § 1681(a). And retaliation for filing a complaint about sex discrimination is just as much "discrimination" "on the basis of sex" when the complaint concerns discrimination against others as when the complaint concerns discrimination against oneself.

There might be some textual basis for limiting the retaliation protection to those who protest discrimination directed against themselves if Title IX provided that no person shall be subject to discrimination "on the basis of *such individual's* sex." In that instance, one could argue that retaliation can only be described as discrimination on the basis of the complainant's sex if the complaint that triggers the retaliation concerns sex-based discrimination against the complainant herself. But Title IX does not contain any such limiting phrasing. The absence of that language from Title IX is particularly notable because Congress included language of that kind in other anti-discrimination statutes. *See, e.g.*, 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of *such individual's* race, color, religion, sex, or national origin . . . ." (emphasis added); 29 U.S.C. § 623(a) ("It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of *such individual's* age . . . .") (emphasis added).

2. There is also no basis in the language of the regulations implementing Title IX for drawing a distinction between those who complain about discrimination against themselves and those who protest discrimination against others. A recipient of federal assistance violates the Department of Education's regulation if the recipient retaliates against "*any* individual for the purpose of interfering with *any* right or privilege secured by [20 U.S.C. § 1681] of the Act or this part, or because he has made a

complaint, testified, assisted, or participated *in any manner* in an investigation, proceeding or hearing under this part." 34 C.F.R. § 106.71 (as incorporated by 34 C.F.R. § 100.7(e) (emphasis added)).

The regulation does not contain any requirement that the right or privilege to be interfered with must belong to the person who suffers the prohibited retaliation. Nor is there a requirement that the complaint or other participation involve discrimination against the complainant or participating individual. On the contrary, the repeated use of the adjective "any" makes absolutely clear that the protection against retaliation extends to those who advocate the rights of others. And that is how the government interprets the regulation and the statute itself. *See DOJ Title IX Manual, supra,* at 71-72; Br. for the United States as Amicus Curiae at 11-12.

B. Precedent Supports Protecting Those Who Complain About Discrimination Against Others

There is also no basis in precedent for limiting Title IX's retaliation protection to "direct victims" of discrimination. We are not aware of any reported Title IX retaliation case (apart from the decision below) that turns on whether the claimant had protested discrimination against him or herself rather than discrimination against others.

Consistent with the precedent concerning Title IX, none of the major civil rights statutes that expressly bar retaliation limits its protection to those who protest discrimination against themselves. On the contrary, those statutes consistently protect all those who complain even if they complain solely about discrimination against others.

For example, the anti-retaliation provision of Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . . to discriminate against *any* individual . . . . because he has opposed *any* practice made an unlawful employment practice by this subchapter, or because

he has made a charge, testified, assisted, or participated *in any manner* in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3 (emphasis added). Other civil rights statutes with anti-retaliation provisions likewise cover those who complain about discrimination against others. *See* 42 U.S.C. § 12203(a) & (b) (2000) (Americans with Disabilities Act); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act); 29 U.S.C. § 2615(a) (Family and Medical Leave Act).

Furthermore, apart from the court of appeals in this case, the courts of appeals have not drawn a distinction between "direct" and "indirect" victims when construing the retaliation protection provided by anti-discrimination statutes that do not have express anti-retaliation provisions. *See, e.g., Peters*, 327 F.3d at 318 (Title VI); *Johnson*, 215 F.3d at 576 (Section 1981); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1447 (10th Cir. 1988) (same); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-70 (6th Cir. 1977) (same).

Even more importantly, drawing such a distinction conflicts with *Sullivan*. As discussed above, the white victim in *Sullivan* was expelled from membership in his community park for complaining about discrimination against his black lessee. The Court held that he could maintain an action under Section 1982 because he had suffered retaliation "for the advocacy of [the lessee's] cause." 396 U.S. at 237. The Court explained that, if such retaliation were lawful, it "would give impetus to the perpetuation of racial restrictions on property." *Id.* The Court made no suggestion that Section 1982 requires that the person suing for retaliation have suffered or protested an independent violation of his own rights. And there is no reason to believe that Congress intended to impose such a requirement under Title IX.

C. Protection For Those Who Protest Discrimination Against Others Is Necessary To Further The Purposes Of Title IX

As the Court's analysis in *Sullivan* indicates, there is no reason to limit protection against retaliation to those who complain about personal discrimination rather than discrimination against others; rather, there is good reason not to do so. At times, "the only effective adversary" of discrimination is someone who is not its direct target. *Sullivan*, 396 U.S. at 237 (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)). That is frequently true with discrimination in violation of Title IX.

Often, the persons protected by Title IX are students and minors. They are generally poorly situated to recognize discrimination or to raise complaints about it. Adult employees of schools are far better positioned both to identify potential Title IX violations and to bring them to the attention of school administrators in a way that will result in voluntary compliance with Title IX's requirements.

For example, the high school girls on petitioner's basketball team were unlikely to have access to information detailing the allocation of resources to their team as compared to similarly situated boys' teams. And, even if the girls knew or sensed that they were being short-changed, they may well have been unaware that there was anything they could do about it. Even if they were aware of their rights, as minors and students, they may have been reluctant to complain, for fear of displeasing those in authority, who they recognized exercised significant control over their day-to-day lives at school.

Girls like those on petitioner's team need advocates like petitioner to stand up for their right to equal treatment. If petitioner and others like him are deterred from complaining because of fear of retaliation, one of the most effective means of Title IX enforcement will be foreclosed. Thus,

protection for teachers and coaches who complain about discrimination directed primarily against students is vital to achieving Title IX's goal of rooting out sex discrimination in educational programs that receive federal funds.

D. Restricting Retaliation Protection To "Direct Victims" Would Be Difficult To Implement And, In Any Event, Would Not Justify Dismissing Petitioner's Complaint

Not only is there no legal basis for restricting the protection that Title IX provides against retaliation to so-called "direct victims," but such a restriction would be extremely difficult to administer. An attempt to distinguish between those directly harmed by discrimination and those harmed only indirectly would unnecessarily complicate discrimination cases with subtle factual and legal questions about who is and who is not a "direct" victim of discrimination. Resolving those questions would distract judges and juries from the real and important issues presented by the cases, and Title IX's goal of providing effective protection for discrimination victims would be frustrated.

This case illustrates the elusiveness of the court of appeals' proposed distinction between direct and indirect victims. The court of appeals blithely assumed that petitioner was not directly harmed by the sex discrimination about which he complained. *See* Pet. App. 23a. But that assumption ignores both the allegations in petitioner's complaint and the reality that the working lives of teachers and coaches are inextricably intertwined with the educational experiences of the students in their charge.

Petitioner alleged and thus is entitled to the opportunity to prove that he was directly harmed by the discriminatory treatment that he protested. Petitioner was the coach of a high school girls' basketball team, and he complained that the girls' team was denied equal funding and equal access to

sports facilities and equipment. J.A. 10-11; Pet. App. 3a. It was petitioner's responsibility as coach to help the team perform to its maximum potential, and the discrimination against the team impaired his ability to perform that job. Inadequate funding, equipment, and facilities have a direct adverse effect on a team's performance. And, to the extent that the players on petitioner's team were aware of the unequal funding and access to equipment and facilities, the discrimination may also have adversely affected their performance by damaging their self-esteem and morale. Moreover, to the extent that the team had to use the athletic facilities at inconvenient times or under uncomfortable conditions, petitioner, as the team's coach, suffered the same inconvenience and discomfort as the girls on the team.

In addition, because the girls' team was valued less highly by respondent than the boys' teams, petitioner's status as coach of the girls' team was diminished both in his view and the view of the educational community. Thus, because he was provided with unequal, less desirable terms of employment simply because he was the coach of a girls' rather than a boys' team, petitioner was discriminated against on the basis of sex, as he alleged in his amended complaint. See J.A. 10-11 (alleging that respondent "refuse[d] to contract with [petitioner] on terms free of gender" and that he "was subjected to adverse terms of employment because of gender discrimination").

Thus, petitioner alleged, and must be allowed to prove, that he was a "direct" victim of the sex discrimination about which he complained. The court of appeals' alternative holding would therefore be insufficient to support its judgment even if it were correct.

But that holding is not correct, as petitioner's situation and the court's failure to appreciate the direct harms that he suffered illustrate. Teachers and coaches are frequently harmed by discrimination directed primarily at their students,

and students are frequently harmed by retaliation or other discrimination directed primarily at their teachers and coaches.[12] Extensive factual inquiries designed to classify victims of discrimination as "direct" or "indirect" would be a needless and counterproductive distraction from the purpose and mandate of Title IX – the elimination of *all* discrimination based on sex from educational programs and activities receiving federal financial assistance.

CONCLUSION

For all of the reasons given above, the decision of the Eleventh Circuit should be reversed.

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August 19, 2004

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[12] For example, the retaliation against petitioner likely harmed not only him, but also the girls on the team, as well as girls in the school (and perhaps the school district) generally. Petitioner's demotion likely reinforced the impression and the reality that the girls' team was less valued than the boys' team. In addition, petitioner's demotion deprived the girls of the benefit of his coaching abilities.

APPENDIX A

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Title IX of the Education Amendments of 1972 are codified at 20 U.S.C. §§ 1681 *et seq*. as follows:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition.

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions.

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one

sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets.

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine.

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy.

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations.

this section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association,

Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences.

this section shall not apply to-

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for--

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions.

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants.

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual

has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance.

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided,* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined.

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances

and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

APPENDIX B

REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the federal regulations effectuating Title VI of the Civil Rights Act of 1964 are published at 34 C.F.R. part 100 as follows:

§ 100.7 Conduct of investigations.

. . .

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Pertinent provisions of the federal regulations effectuating Title IX of the Education Amendments of 1972 are published at 34 C.F.R. part 106 as follows:

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 CFR 100.6-100.11 and 34 CFR, Part 101.

(21)

No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

1. In August 1999, the Petitioner, Roderick Jackson, began working for the Birmingham Board of Education ("Board") at Ensley High School as a physical education teacher. Joint Appendix ("J.A.") 10. In addition to working as a teacher, the Petitioner also coached the girls basketball team. J.A. 10. It was in the Petitioner's latter capacity that he allegedly observed differential treatment among the girls and boys basketball teams. J.A. 10-11. Petitioner claimed that he complained about the alleged treatment to his supervisor, and as a result, he allegedly received a negative work evaluation that eventually led to the discontinuation of his coaching duties in May 2001. J.A. 10-11. It is undisputed that Petitioner retained his tenured position as a physical education teacher at Ensley. J.A. 10-11.

2. On July 27, 2001, the Petitioner filed a Complaint, alleging that the Board discriminated against him on the basis of his gender in violation of 20 U.S.C. § 1681, *et seq.* ("Title IX"). *See* J.A. 9-12. The Complaint, however, was not a model of clarity. J.A. 13. Construing the Complaint in a light most favorable to the Petitioner, it appeared that he was attempting to assert both a claim that the Board discriminated against him on the basis of his gender in violation of Title IX and 20 U.S.C. § 1681, and a retaliation claim. *See* J.A. 9-12. Also in the Complaint, the Petitioner made a broad reference to Title VII. However, he did not state a Title VII claim, and significantly, he never filed the requisite EEOC charge that is required as a condition precedent to filing a Title VII lawsuit. J.A. 9-12, 14.

3. On July 30, 2001, the Petitioner subsequently filed an Amended Complaint. *See generally*, J.A. 9-12. In his Amended Complaint, he alleged that the girls team was not provided a key to the padlock for the sports facility, and they were prohibited from using certain equipment. J.A. 10-11. Yet, the Petitioner made no specific allegations as to how the Board discriminated against him on the basis of his gender. He instead alleged that he received "negative evaluations" and that he "was terminated on May 7, 2001." J.A. 11. This, however, was untrue. J.A. 16. The Petitioner finally

conceded that he was still employed with the Board at the time that he filed his lawsuit, and he has remained employed with the Board at all times relevant to this matter. J.A. 25.

4. On September 10, 2001, the Board filed a Motion to Dismiss, contending that Petitioner lacked standing to assert a Title IX claim, and that he failed to state a claim under Title IX. *See generally*, J.A. 13-23. The Board also contended that Title VII was the exclusive remedy for allegations of employment discrimination on the basis of sex in federally funded educational institutions. J.A. 18-19. On September 13, 2001, the Petitioner filed a response to the Board's Motion. *See generally*, J.A. 24-28.

5. On January 10, 2002, the Magistrate Judge entered a Report and Recommendation ("Report"), recommending the dismissal of the Petitioner's Complaint. Petition Appendix ("Pet. App.") 28a-33a. In his Report, the Magistrate Judge rejected each and every one of the Petitioner's claims. *See* Pet. App. 28a-33a. More specifically, the Magistrate Judge found that the Petitioner failed to state a claim for which relief could be granted, he lacked standing to assert a claim under Title IX, and his claim was pre-empted by Title VII. Pet. App. 30a-31a.

6. The Magistrate Judge's finding that the Petitioner lacked standing was premised on the fact that the Petitioner, a male coach, had no standing to assert the claims of the female members of the girls basketball team for alleged violations of their rights. Pet. App. 30a. Consequently, the Magistrate Judge reasoned that the "persons" allegedly subject to discrimination under Title IX were the female members of the basketball team – not their male coach: "Their coach has no standing to assert for them their claims of discrimination in this regard because he has suffered no personal loss or injury due to the discrimination, which is the sine qua non of standing." Pet. App. 30a.

7. Furthermore, the Magistrate Judge held that to the extent that the Petitioner was asserting the loss of an employment benefit – i.e., the discontinuation of his coaching

responsibilities and denial of the corresponding coaching salary – this was more properly a claim of employment-related discrimination under Title VII, rather than Title IX. Pet. App. 31a. Such claims "must rest exclusively under Title VII, and not Title IX . . . which preempts any employment-discrimination under Title IX." Pet. App. 31a. The Magistrate Judge further held that the Petitioner's denouncement of any reliance on Title VII essentially mooted his claims of employment discrimination as Title VII was the exclusive mechanism upon which the Petitioner could have brought these claims. Pet. App. 31a.

8. The Magistrate Judge subsequently recommended that the Board's Motion to Dismiss be granted, and the Petitioner's Complaint dismissed. Pet. App. 33a.

9. On February 25, 2002, United States District Judge Robert B. Propst adopted the Magistrate Judge's Report. Pet. App. 27a. The court also found the holding in *Holt v. Lewis*, 955 F. Supp. 1325 (N.D. Ala. 1995), *aff'd*, 409 F.3d 771 (11th Cir. Feb. 21, 1997), *cert. denied*, 522 U.S. 817, 118 S. Ct. 67, 139 L. Ed. 2d 29 (Oct. 6, 1997), persuasive, particularly as it found no controlling Eleventh Circuit or Supreme Court authority supporting the Petitioner's contention that Title IX created a private cause of action for retaliation. Pet. App. 27a. Rather, the district court found that Title IX did not create such a right and affirmed the Magistrate Judge's recommendation of the dismissal of the Petitioner's lawsuit. Pet. App. 27a.

10. On March 5, 2002, the Petitioner filed a Notice of Appeal with the Eleventh Circuit.

11. On October 21, 2002, the Eleventh Circuit issued its Opinion. After construing the facts alleged in the Complaint in a light most favorable to the Petitioner, the Eleventh Circuit still held that the Petitioner's claims were due to be dismissed. *See* Pet. App. 1a-26a. Specifically, the Eleventh Circuit held that "*Alexander v. Sandoval* plainly precluded a federal court from implying a right of action for retaliation or expanding the class benefitted by Title IX." Pet. App. 26a. In ultimately dismissing the Petitioner's Complaint, the Eleventh Circuit

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found that no private right of action or private remedy existed for retaliation.

12. The primary basis for the Eleventh Circuit's holding was this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Pet. App. 6.

> First, *Sandoval* distills and clarifies the approach we are obliged to follow in determining whether to imply a private right of action from a statute. Second, *Sandoval* resolved a claim under Title VI of the Civil Rights Act of 1964 ("Title VI"), 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, which is the model for Title IX and whose language Title IX copies nearly verbatim. . . . Third, like Jackson, the plaintiffs in *Sandoval* relied on a regulation promulgated to enforce Title VI as the basis for implying a private right of action.

Pet. App. 8a-9a. *Sandoval*, in turn, held that Title VI did not imply a right of action for private litigants to assert a cause of action for disparate impact. Morever, in *Sandoval*, the Supreme Court instructed that legislative intent was the only basis upon which a private right of action could be properly inferred.

13. *Sandoval*, then, was the "template" that the Eleventh Circuit followed exclusively in reaching its decision to affirm the dismissal of the Petitioner's Complaint. Pet. App. 17a, 24a-26a.

14. The Eleventh Circuit also utilized the four (4) prong test of *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) in its analysis of the Petitioner's claims. However, the Court recognized that the Supreme Court had "receded" from the test set forth in *Cort*. Pet. App. 19a.

15. The Eleventh Circuit also distinguished the Supreme Court's holding in *Sandavol* from *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), to the extent that *Cannon* did not address the question that was before them. The question was "whether Title IX implies a private right of action to redress retaliation resulting from Title

IX complaints or whether individuals other than direct victims of gender discrimination have any private rights under Title IX at all." Pet. App. 19a.

16. In response to the question, the Eleventh Circuit concluded that, "after reading Title IX in the manner required by *Sandoval*, we can find nothing in the language or structure of Title IX creating a private cause of action for retaliation, let alone a private cause of action for retaliation against individuals other than direct victims of gender discrimination." Pet. App. 19a.

17. Initially, the Eleventh Circuit looked to the text of § 901 of Title IX, which it observed made no mention of retaliation at all. Pet. App. 19a-20a. The fact that retaliation was not mentioned anywhere in the statute led the Eleventh Circuit to conclude that the omission "weigh[ed] powerfully against a finding that Congress intended for Title IX to reach retaliatory conduct." Pet. App. 20a.

18. The Eleventh Circuit then looked to § 902 of Title IX and held that it also did not reveal any intent by Congress to imply a private right of action for retaliation. The Court further held that § 902 did not reveal any private right of action of any kind. Pet. App. 20a-21a.

19. Based on its review of §§ 901 and 902, the Eleventh Circuit concluded "much like the Supreme Court did in *Sandoval*, that nothing in the text or structure of §§ 901 and 902 yields the conclusion that Congress intended to imply a private cause of action for retaliation." Without evidence of congressional intent, the Eleventh Circuit determined that it was not empowered to create a right that Congress did not intend to create. As the text of these sections revealed no indication that Congress intended that Title IX prevent or redress retaliation, they could not "imply a private right of action to redress it." Pet. App. 21a-22a.

20. The Eleventh Circuit also rejected the notion that Title IX's regulations-which did reference retaliation-created a private remedy. Quoting *Cannon*, the Eleventh Circuit

reiterated the general principle that, "[l]anguage in a regulation. . .may not create a right that Congress has not." Pet. App. 22a.

21. Furthermore, the Eleventh Circuit held that Title IX was only intended to protect direct victims of gender discrimination. As the statute did not specifically mention individuals other than actual victims of discrimination, indirect victims could not be brought under the umbrella of the class that was meant to be protected under Title IX. Pet. App. 24a.

22. The Eleventh Circuit concluded that Title IX did not imply a private right of action for individuals who were allegedly retaliated against for complaining about the gender discrimination suffered by others. "Statutory intent," the Court stressed, "remains the touchstone of our analysis." Pet. App. 24a-26a. Without such intent, the Eleventh Circuit determined that it could not imply a private right of action, regardless of how desirable the implied right may be. *Id.*

23. On May 2, 2003, the Petitioner filed a Petition for Writ of Certiorari with this Court. The question presented by Petitioner was, as follows:

> Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

The Petitioner's question, however, completely fails to address whether an implied right exists as to indirect victims of discrimination.

24. On July 15, 2003, the Respondent filed a Brief in Opposition to the Petition for Writ of Certiorari.

25. On June 14, 2004, this Court granted the Petition.

SUMMARY OF ARGUMENT

Retaliation is not referenced in the text of Title IX. In fact, a plain reading of Title IX reveals that the word "retaliation" is nowhere in its text. Presumably, retaliation is not mentioned because Congress did not intend for Title IX to encompass such claims. Accordingly, there is no enforceable private right of action for retaliation under Title IX. The Petitioner, however, contends that he is entitled to an implied private remedy because an anti-retaliation provision is implicit in civil rights statutes. Yet, this argument fails because it is not consistent with Congressional intent or to this Court's current approach to implied private rights of action. The Petitioner's reliance on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969), is also unsustainable since it was decided after Congress enacted Title VI. This is an important distinction since Title IX has been held to be in *pari materia* with Title VI. Defects in finding implied rights under Title VI, reveal similar defects in Title IX. In turn, if *Sullivan* does not apply to Title VI, then it is equally inapplicable to Title IX. It cannot be said, then, that Congress implied a right for retaliation under either Title VI or Title IX or by its silence on *Sullivan*.

Moreover, there is a palpable difference between discrimination and retaliation. That is, being punished for speaking out on an issue regarding sex is not the same as being discriminated against on the basis of one's sex, particularly where the complainer's sex is not at issue. This distinction is significant since liability under Title IX turns "on the basis of sex." 20 U.S.C. § 1681. If the complainer's sex is not at issue, he is reduced to the status of an "indirect" victim of discrimination, who falls outside of Title IX. The Petitioner has not alleged discrimination on the basis of *his* sex. Rather, he has alleged discrimination on the basis of someone else's sex. Therefore, he is an indirect victim of discrimination. Accordingly, he fails the "on the basis of sex" proviso of Title IX.

Additionally, the Petitioner may not reference Title VII's anti-retaliation provision by analogy. Title VII and Title IX are two (2) different statutes. Title VII was enacted pursuant to

the Commerce Clause, has a strict administrative scheme, and it also has an express anti-retaliation provision built into the body of the statute. Title IX, on the other hand, was enacted under the Spending Clause, and it has no anti-retaliation provision in its body. Title VII is, however, illustrative of what Congress did not do with Title IX: enact an anti-retaliation provision.

Nor do the regulations implementing Title IX bolster the Petitioner's search for redress. Specifically, Congress did not articulate an express desire to expand Title IX's ban on discrimination to include retaliation. The statute does not even speak to the issue of a private right of action generally, and it certainly does not refer to a private right of action for retaliation, specifically. In fact, the prohibition against retaliation is found only in the regulations for Title VI, that is, 34 C.F.R. § 100.7(e) ("§ 100.7(e)"). By prohibiting an act that is not prohibited by the statute, § 100.7(e) improperly extends beyond Title IX. As no private right of action may exist under a regulation that does not also exist in the actual statute, § 100.7(e) is out of harmony with Title IX, and is not entitled to deference by this Court.

In addition to being outside of the scope of Title IX, § 100.7(e) cannot be treated as an interpretation of the statute. In *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d (1984), this Court held that where a statute is ambiguous, courts may rely on the administrative agency's interpretation of the statute in construing the statute. No such ambiguity exists here. Title IX clearly describes the type of discrimination prohibited and retaliation against third-party complainers is not included. Since there is no ambiguity as to whether Title IX creates a private cause of action for retaliation, § 100.7(e) is not entitled to deference, nor would it be since it has impermissibly exceeded the statute.

Title IX should not be afforded the "broad sweep" encouraged by the Petitioner. A broad interpretation would lead to an abrogation of the actual statute as implied terms would replace express terms, allowing for almost unlimited

liability. Such boundless liability is in contravention of Title IX which, by its own terms, has only one express remedy: suspension or termination of federal funds. 20 U.S.C. § 1681. This would also be violative of the principles of *Pennhurst State Sch. & Hosp. v. Halderman*, which necessitates that when Congress imposes a condition on a state's receipt of federal funds, it "must do so unambiguously." 451 U.S. 1, 17, 101 S. Ct. 1531, 1540 67 L. Ed. 2d 694 (1981). For that matter, statutes enacted under Title IX are said to be in the nature of a contract between the government and the funding recipient; the terms of the contract, then, must be clear and unambiguous. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656, 119 S. Ct. 1661, 1678, 143 L. Ed. 2d 839 (1999) (Kennedy, J., dissenting). Since Title IX does not create an explicit private cause of action, this Court must engage in finding a private right by implication. Implying rights, however, is inapposite to the actual notice standard required under the Spending Clause. The question then becomes did the Board have actual notice that it would be liable under Title IX for allegedly retaliating against a male coach for complaining against sex discrimination. The answer is no. The Board did not have "clear and unambiguous" notice that it would be liable in damages for allegedly retaliating against a person that it did not discriminate against on the basis of his sex.

The structure of Title IX also weighs against an implied remedy for retaliation. Title IX already contains an express administrative remedy. This fact strongly suggests that Congress meant to preclude other remedies not specifically listed. Thus, the structure of Title IX as well as its express administrative remedies discourage any further expansion of implied remedies.

Further, an important distinction must be made between "direct" and "indirect" victims of discrimination. The Eleventh Circuit recognized this distinction when it held that, as an indirect victim of discrimination, the Petitioner did not have an implied or private cause of action under Title IX for discrimination "on the basis of sex." Since the Petitioner was

deemed to be an "indirect victim" of discrimination, he was not protected by Title IX.

Lastly, *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), should – like it did three (3) years ago – guide this Court's holding today. *Sandoval* addressed the interpretation of statutes when implied causes of action are at issue. Relying on this precedent, the Eleventh Circuit held that neither the text nor the structure of Title IX indicate that Congress intended the statute to provide a private cause of action for retaliation discrimination. The Petitioner, however, asserts that the Eleventh Circuit's application of *Sandoval* is the only one of its kind. This is simply not true. As discussed below, district courts, as well as dissenters from other circuit courts, have adopted the Eleventh Circuit's holding that a private cause of action for retaliation does not exist under either Titles IX or VI. Contrarily, the only "rogue" circuit has been the Fourth Circuit which, through its holding in *Peters v. Jenney*, 327 F.3d 307, 318 (4th Cir. 2003), ignored the precedent of *Sandoval (supra)* and *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002).

As it stands, the Eleventh Circuit's reasoning in *Jackson v. Birmingham Bd. of Educ.* (*supra*), was correct, and should be affirmed by this Court.

ARGUMENT

I. INTRODUCTION

Title IX begins with the declaration that, "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Notably, this statute – which is deceptively straightforward – says nothing about retaliation or even sports. Instead, it stands for a general prohibition against discrimination on the basis of one's sex by recipients of federal funds. Moreover, the "sex" referred to in the statute has predominantly stood for females.

The crux of the statute lies in the following five (5) words: "on the basis of sex." This means that a victim of discriminatory treatment must show that their sex motivated the improper treatment. The aforementioned five (5) words compelled the United States District Court for the Northern District and the United States Court of Appeals for the Eleventh Circuit to conclude that the Petitioner had no cognizable claim under Title IX since he had not been discriminated against on the basis of *his* sex. In other words, the Petitioner's claims were not rooted in discrimination "on the basis of sex" as the statute requires. Rather, his claims were based on alleged retaliation-conduct which is clearly not within the express language of Title IX. Retaliation, though prohibited by enabling regulations, is not prohibited by its text. In fact, retaliation is not mentioned anywhere in the text of the statute. Presumably, no specific mention is made of retaliation because Congress did not intend for Title IX to encompass such claims.

Much jurisprudence has, however, centered not on what statutes provide expressly, but rather on what they do *not* provide and what may be implied from the omission. Hence, the corpus of law regarding implied rights of action was born. *Cannon v. University of Chicago*, 441 U.S. 677, 732, 99 S. Ct. 1946, 1975-76, 60 L. Ed. 2d 560 (1979) (Powell, J., dissenting), *citing, Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 36 S. Ct. 432, 60 L. Ed. 874 (1916). An implied right, however, turns on a finding of Congressional intent; Congressional intent, whether self-evident or implied, is the veritable yardstick by which implied rights of action are measured. Yet, where the intent to create an implied right is not clear by analysis of the statute's text and structure, no such right is found to exist. *Alexander v. Sandoval*, 532 U.S. 275, 286-87, 121 S. Ct. 1511, 1519-20, 149 L. Ed. 2d 517 (2001).

The text of Title IX does not support the Petitioner's retaliation claim. He simply does not have a cognizable private right of action for retaliation according to Title IX's express terms. Reaching this conclusion, however, does not diminish the effective purpose of the statute or adversely affect those who Congress intended to benefit under its provisions. Nor

does reaching this conclusion disturb enforcement of the statutory purpose. That is, women's place in our society would not regress to before 1972 when Title IX was first enacted. Further, direct victims of sex discrimination would still have a mechanism for pursuing their rights under Title IX. The only difference would be that the express terms of the statute would override any implication or inference. This Court, in turn, would no longer need to forage for a cause of action under Title IX where there simply is none. Furthermore, to deny the Petitioner's Title IX claims would avoid the assured slippery slope he advances. The statute would be upheld according to its *express* terms and direct victims of discrimination would benefit from the same. Affirming the lower courts' decisions to dismiss the Petitioner's claims would ensure that Title IX protects its "unmistakable focus on the benefitted" class of persons rather than mere bystanders like the Petitioner. *Cannon*, 441 U.S. at 691, 99 S. Ct. at 1955.

Additionally, to read an anti-retaliation provision into Title IX would be tantamount to an amendment, which is well beyond a mere interpretation of the law. Certainly, if Title IX is to be amended to include a claim for retaliation, Congress is the proper Branch to cause such to occur. "[A]bsent specific direction by Congress," this Court "should be extremely reluctant to imply a cause of action" and should be even more reluctant to "sit as a committee of review" or attempt to "wield a power to veto" that was not congressionally bestowed upon it. *See Cannon*, 441 U.S. at 744-45, 99 S. Ct. at 1982 n.14 (Powell, J., dissenting), *quoting University of Cal. Regents v. Bakke*, 438 U.S. 265, 418-421, 98 S. Ct. 2733, 2814-15, 57 L. Ed. 2d 750 (1978). Our system of government is a tripartite one – Executive, Legislative and Judicial – rather than a quadripartite system, where its federal agencies are the fourth Branch. A Federal agency may not rise to the level of Congress, and its regulations may not rise to the status of law. This is especially so where the regulations are contrary to the express provisions of the statute. Thus, to the extent that *stare decisis* conflicts or clouds the same, these prior decisions are due to be reconsidered by this Court and a ruling entered that harmonizes with this

Court's reasoning set forth less than three (3) years ago in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Specifically, no further extension of *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969), *Cannon v. University of Chicago*, or *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1991), is necessary, and the implied right of action test under *Cort v. Ash* is due to be limited to its proper sphere of influence.

II. THE EXPRESS LANGUAGE OF TITLE IX DOES NOT SUPPORT A CAUSE OF ACTION FOR RETALIATION

When Title IX was enacted in 1972, it was enacted with two (2) principal objectives in mind: "[t]o avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 301, 118 S. Ct. 1989, 2005, 141 L. Ed. 2d 277 (1998), *quoting Cannon*, 441 U.S. at 744-45, 99 S. Ct. at 1961-62. It was modeled after Title VI of the Civil Rights Act of 1964, with the exception that Title VI substitutes "sex" with "race." *Grove City College v. Bell*, 465 U.S. 555, 566, 104 S. Ct. 1211, 1217-18, 79 L. Ed. 2d 516 (1984). Title IX has an express means of enforcement, including the ability of agencies who disburse education funding, namely the Department of Education and its Office of Civil Rights ("OCR"), to terminate or suspend funding to a recipient. 20 U.S.C. § 1682. Although these agencies are empowered to enforce Title IX in its entirety, § 901 is the paragraph that is the essence of Title IX. This Section begins with, "[n]o person . . . shall, on the basis of sex," and concludes by referencing discrimination. *See* 20 U.S.C. § 1681, *et seq.* Conspicuously absent from § 901 is the one word that has brought this matter from a federal court in the Northern District of Alabama to its present place before this Court: retaliation.

Title IX itself seems clear and unambiguous on the issue of retaliation since it is not referenced in the text of the statute. Discrimination, on the other hand, is mentioned. Presumably, no specific mention is made of retaliation because Congress

did not intend for Title IX to encompass such claims. Yet, as evident from the Petitioner's contentions and a few corroborative cases from the Fourth Circuit[1], the exclusion of retaliation from the text of Title IX has not stopped private litigants from attempting to breath life into what appears to be a dead issue. By endeavoring to cull a cause of action out of congressional silence and statutory omission, this private litigant seeks to create by implication that which is not within the statutory coverage. The Petitioner further contends that discrimination is, in effect, retaliation and that the two (2) exist symbiotically. *See* Petitioner's Brief ("Pet. Br.") 12-14. The text of the statute, however, belies the Petitioner's contentions.

Contrary to the Petitioner's contentions, this case *is* about whether this Court should recognize a new cause of action. In fact, by seeking to enforce a right by implication rather than one that is expressly granted by the statute, this Court would either have to create a new right out of whole cloth or expand its current provisions to embrace a right that the statute does not expressly provide. Thus, the real question before this Court is two-fold: (1) how to define the scope of the implication; and (2) to resolve whether, even if such a right is implied, should it be extended to this Petitioner, an alleged indirect victim who is not basing his claim on gender discrimination as addressed by Title IX. Specifically, this Court must determine whether such a private action exists. If so, whether that right extends to one who was not a direct victim of gender discrimination.

The Eleventh Circuit – principally relying on this Court's holding in *Alexander v. Sandoval* – answered the implication in the negative. That is, the Eleventh Circuit concluded that no implied private right of action existed because Title IX did not expressly prohibit retaliation, and there was no Congressional intent to create such an implied right. *See* Pet. App. 1a-26a. The Eleventh Circuit also found that the administrative regulations at issue could not create a remedy that Congress itself did not intend to create. Pet. App. 22a-

1. *See Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003); *see also, Preston v. Virginia ex rel. New River Community College*, 31 F. 3d 203 (4th Cir. 1994).

23a. The Eleventh Circuit also answered the latter part of the issue, that is, whether Title IX extends to indirect victims of gender discrimination. Again, their response was "no": "[w]e thus hold that Title IX does not imply a private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others." Pet. App. 24a-25a. The Petitioner's prayer for relief, then, is not confined to defining the scope of a "statutory right long recognized." Pet. Br. 11. Rather, the only way he may bring his claim for retaliation is by recreating and rewriting Title IX so that he, as an indirect victim of discrimination, may benefit.

A. TITLE IX ONLY PROHIBITS DISCRIMINATION, NOT RETALIATION

The Petitioner contends that "retaliation is a variant of discrimination," and advances the notion that prohibiting one inexorably prohibits the other. Pet. Br. 13. Yet, the reality is that retaliation and discrimination are not as identical as he contends. As the Fifth Circuit has noted, "[w]hile retaliation is technically a form of employment discrimination, *it is not independently prohibited by the proscription against discrimination on the basis of sex in federally-funded educational institutions, which is the heart of Title IX.*" *Lowrey v. Texas A&M Univ.*, 117 F.3d 242, 248 n.6 (5th Cir. 1997) (emphasis in original).

1. *A Prohibition Against Retaliation is not Implicit in Civil Rights Statutes Generally.* The Petitioner argues that he is entitled to an implied private remedy because anti-retaliation is implicit in civil rights statutes. Pet. Br. 12-15. This argument fails because it is not consistent with Congressional intent or this Court's current approach to the creation of implied private rights of action. The Petitioner relies principally on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969), to support his position, however, *Sullivan* cannot sustain his claim.

Sullivan allowed a private cause of action for retaliation under 42 U.S.C. § 1982. The Petitioner claims that *Sullivan* established that anti-retaliation prohibitions are generally included by implication in civil rights statutes. However,

Sullivan does not justify the reliance that the Petitioner places upon it. First, the argument from *Sullivan*, as advanced by the Petitioner, conflicts with *Alexander v. Sandoval* – a later precedent of this Court – which clearly holds that implied rights and remedies can be recognized only if Congress so intended. 532 U.S. 278, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). *Sandoval* specifically noted that the previous, liberal understanding of private rights of action was abandoned in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). *See Sandoval*, 532 U.S. at 287, 121 S. Ct. at 1520. Thus, cases under the "*ancien regime*" have been abandoned and should be approached with caution to the extent that they conflict with *Sandoval* and *Cort v. Ash*. *See Sandoval*, 532 U.S. at 288, 121 S. Ct. At 1520. *Sullivan* has not been overruled, but *Sandoval* requires that it be limited to its facts.[2]

Still, the most glaring problem with *Sullivan* is the fact that it was decided *after* Congress enacted Title VI. Thus, in enacting Title VI, Congress could not have known that courts would imply a cause of action for Title VI based on *Sullivan*, which dealt with an entirely different statute.

As it stands, *Sullivan* is distinguishable from the instant case on its facts. Moreover, its expansive treatment of the implied rights doctrine is contrary to this Court's attempts to retreat from the same. *See Touche Ross v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979); *see also, Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988); *Sandoval, passim*. Due to the dated nature of *Sullivan* and its incongruence with current law, it should be reconsidered or at the very least, limited by this Court.

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2. It is not clear to what extent *Sullivan* survived *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), which held that 42 U.S.C. § 1981 covered only discrimination in the making and enforcement of contracts and not racial harassment during the employment relationship. *Patterson* was overruled by statute, but this Court later held that the amendment was not retroactive, implicitly rejecting arguments that § 1981 should have been broadly construed from the outset. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994). Neither *Patterson* nor *Rivers* discussed *Sullivan*, but their holdings caution against an expansive reading of that case.

2. *The Text of Title IX Does Not Reveal That its Prohibition Against Discrimination Includes a Similar Ban Against Retaliation.* A plain reading of discrimination under Title IX does not encompass retaliation. As discussed by the court in *Litman v. George Mason Univ.*:

> A comparison of the two claims provides an answer to the query by highlighting the differences. Section 1681 prohibits discrimination "on the basis of sex," which means a victim of discriminatory treatment must show she directly suffered harm from that discrimination and that her gender motivated the improper treatment. On the other hand, a claim of retaliation is fundamentally an assertion that one spoke out about discrimination and *was punished for speaking out*. The harm from retaliation is not a direct result of discrimination on the basis of sex but stems from the actions one took in response to the discrimination. In other words, the harm suffered by a victim of retaliation, while prohibited by the Title IX regulations, is not clearly prohibited by Title IX's text, because it does not result directly from unlawful discrimination *on the basis of sex*.

156 F. Supp. 2d at 585 (E.D. Va. 2001) (emphasis in original). Thus, being punished for speaking out on an issue regarding sex is not the same as being discriminated against on the basis of one's sex, particularly where the complainer's sex is not at issue. For instance, being passed over for a promotion for a lesser qualified applicant of another race, is not the same as being passed over for a promotion after challenging the hiring practices of the employer. In the former instance, the employee's race is center stage and is the cause of the employee's injury. In the latter instance, his *speech* is center stage and his race is not an issue at all. Instead, he is being penalized for his speech. As evident from the example, discrimination and retaliation may exist separately and apart from each other.

One must recognize that Congress explicitly decided not to create a private right of action for retaliation under Title IX. This choice is evident by their corresponding choice not to include the language anywhere in the statute or in a separate provision, as it did in Title VII. Additionally, the standard for Title IX is codified in the following words: "on the basis of sex." These words are the gatekeeper of Title IX claims, meaning, that one should not proceed without first satisfying this requirement. *See Lamb-Bowman v. Delaware State Univ.*, 152 F. Supp. 2d 553, 561 (D. Del. 2001) (holding that the plaintiff had "not demonstrated that she suffered retaliation because she complained of discrimination based on her sex"). As evident from the Petitioner's Complaint, he has not alleged discrimination on the basis of *his* sex. Rather, at all times, he has alleged that the basis of his retaliation claim is the discriminatory treatment of others based on *their* sex. This clearly fails the "on the basis of sex" proviso of Title IX. To allow the Petitioner to delude this basic requirement would render "on the basis of sex" meaningless. Title IX would devolve from a statute that bans only sex discrimination to a garden-variety discrimination statute whereby anyone could bring a claim of discrimination, regardless of whether sex was even an issue. Certainly, this was not Congress' intent.

3. *Title IX's Text Should Not Be Expanded in Accordance with Title VII.* To offer some clarity to this issue, some courts have instructed that a claim for employment-related retaliation under Title IX should be analyzed in line with the framework of Title VII. *Preston v. Virginia ex rel. New River Community College*, 31 F. 3d 203, 206 (4th Cir. 1994); *A.B. v. Rhinebeck Central Sch. Dist.*, 2004 WL 1944338, *8 (S.D. N.Y. Aug. 24, 2004), *citing Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995). Yet, there is no consensus on this issue among the circuits. *But see, e.g., Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 583 (E.D. Va. 2001) (noting that the text of Title VII's retaliation provision is "markedly different" and is therefore "of limited usefulness in interpreting the Title IX retaliation provision."). Title VII is at least instructive since it is one of the civil rights statutes that has an express anti-

retaliation provision in its body.[3] Perhaps the most significant instruction that one may garner from Title VII is its illumination of what Congress did *not* include in Title IX: "an explicit statement that retaliation for exercising one's rights to be free from unlawful discrimination is itself a form of prohibited discrimination [under Title IX]." *Litman*, 156 F. Supp. 2d at 586. It is further proof that where Congress "was aware that it could create a right of action for retaliatory treatment ... it did so in Title VII," whilst choosing not to create a similar right of action under Title IX. *Litman*, 156 F. Supp. 2d at 584-85.

Nevertheless, Title VII and Title IX are very different. For instance, they have distinct enforcement mechanisms and statutory provisions. The most obvious distinction is the investigatory process of the Equal Employment Opportunity Commission ("EEOC") that inhibits an aggrieved party's ability to file a lawsuit under Title VII until after the EEOC has first had an opportunity to investigate the complaint. 42 U.S.C. § 2000e-4. Additionally, Title IX was enacted pursuant to Congress' Spending Clause power, while Title VII was enacted pursuant to its Commerce Clause power. *Litman*, 156 F. Supp. 2d at 583. A further point of distinction is found in the fact that, unlike Title IX, Title VII contains an express cause of action for damages. 42 U.S.C. § 1981. In contrast, Title IX's remedies are judicially implied and lack the benefit of "legislative expression of the scope of available remedies." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284, 118 S. Ct. 1989, 1996, 141 L. Ed. 2d 277 (1998); *see also, Cannon v. University of Chicago*, 441 U.S. 677, 716-17, 99 S. Ct. at 1968, 60 L. Ed. 2d 560 (1979) (noting that Congress directly addressed the issue of damages under Title VII as well as the maximum amount recoverable). Thus, although Title VII may be instructive, its instructions are limited to serving as an example

3. This section deems it to be an unlawful employment practice for any employer to retaliate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

of what Congress could have done with Title IX if it had chosen to do so, not as a green light to expand Title IX beyond its express terms.

As to those courts that have utilized Title VII by analogy, the federal court in *Litman v. George Mason Univ.*, noted that although Title VII "defines retaliation as a form of discrimination," Congress "defined discrimination more broadly in Title VII than Title IX." 156 F. Supp. 2d at 584; *see also, Waid v. Merrill Area Public Sch.*, 91 F.3d 857 (7th Cir. 1996) (holding that Title VII preempted an employee's claims for sex discrimination under Title IX and 42 U.S.C. § 1983). Such a broad definition, however, was tempered by Congress imposing greater restrictions on an aggrieved party's right to bring suit, including strict adherence to a comprehensive administrative scheme prior to the filing of any lawsuit. *Id.* at 584. The *Litman* court cautioned against expanding Title IX to infer a claim for retaliation under discrimination, like it had done with Title VII. *Id.* at 584. Specifically, the court advised that, "when Congress so clearly chose to limit the scope of Title VII's right of action for retaliation to Title VII complaints, and further to restrict court action on that right to claims that have been administratively exhausted, the Court is reluctant to extend that right (and the manner in which the courts have interpreted it) to the Title IX context." *Id.* at 585. Further,

> the marked differences between both the statutory prohibitions and the administrative schemes created by Title VII and Title IX strongly weigh against expanding the scope of potential liability under Title IX for those receiving federal funds by interpreting "discrimination" to include retaliation, as under Title VII, when Congress did not clearly articulate such an understar ling in the statutory text itself.

Litman, 156 F. Supp. 2d at 584. This language is axiomatic of the well-settled principle that, "when Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and

thereby enlarge their jurisdiction." *Cannon*, 441 U.S. at 730-31, 99 S. Ct. at 1975 (Powell, J., dissenting). Congress did not articulate any desire to expand Title IX's ban on discrimination to include retaliation – even though a bureaucracy may have done so.[4] The statute does not even speak to the issue of a private right of action. This right has been judicially implied, as have the damages available under the same. *E.g.*, *Cannon*, *passim*; *see also*, *Franklin*, *passim*. In turn, there is no legislative expression of the scope of available remedies under Title IX, as there is under Title VII. Since Congress has not spoken to the issue of retaliation under Title IX – and has in fact distinguished Title IX from Title VII by codifying an anti-retaliation provision for one and not the other – it is inappropriate to extend Title IX in accordance with Title VII. The marrying of retaliation and discrimination is contrary to the express terms of Title IX.

Here, Congress has chosen not to create a private right of action for retaliation under Title IX. This choice appears to be evident by Congress' corresponding choice not to include or even reference retaliation in the statute, or to enact a separate anti-retaliation provision.

B. THE TEXT OF TITLE IX SHOULD NOT BE CONSTRUED TOO BROADLY

The Petitioner avers that Title IX should be accorded "a sweep as broad as its language." Pet. Br. 12. A broad interpretation is contrary to the strict interpretation normally afforded to statutes enacted under the Spending Clause. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 28-29, 101 S. Ct. 1531, 1545-46, 67 L. Ed. 2d 694 (1981). Moreover, couched in the Petitioner's request for broad interpretation is a similar request for a broad remedy. This request invokes an

4. Again, Congress did not include retaliation anywhere in the text of Title IX. This is an important distinction as the only reference to retaliation under Title IX is found in its regulations which were written by the Department of Health, Education and Welfare and the Department of Education. Furthermore, the agency's regulation only references retaliation to the extent that it adopts an anti-retaliation regulation in another statute, namely Title VI. *See* 34 C.F.R. § 100.7(e).

application of the "any appropriate relief" standard which has been used before to justify damages outside of the statute. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 61-69-71, 112 S. Ct. 1028, 1029-1034-1035, 117 L. Ed. 2d 208 (1992). The unavoidable result of broad interpretation, in tandem with implied rights, would be the replacement of express terms with implicit ones, and an abrogation of the actual statute.

1. *Too Broad a Construction of Title IX Would Extend Beyond the Scope of the Statute.* The right the Petitioner seeks to assert under Title IX – as would be the case for any private right asserted under the statute – would have to be judicially implied. A broad interpretation, coupled with an implied right, would allow for almost unlimited recovery under Title IX which, by its own terms, has only one express remedy: suspension or termination of federal funds. *See* 20 U.S.C. § 1681, *et seq.*

Such interpretative liberty would allow an implicit remedy to supercede an express one. It "would be anomalous . . . for a judicially implied cause of action [to be expanded] beyond the bounds [Congress] delineated for comparable express cause of action." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289-90, 118 S. Ct. 1989, 1999, 141 L. Ed. 2d 277 (1998). The Court has already allowed for a private cause of action under Title IX – in contravention of the statute *(see Cannon, passim)*, and allowed damages from the same – also in contravention of the statute (*See Franklin, passim*). Now, this Court finds itself in familiar territory, but should not reach the same result. A broad reading of Title IX has led to an expansion of implied rights with no stopping point in sight. The implied rights of Title IX are becoming farther removed from the express terms of the statute. If this Court takes the position of the Petitioner and his amici, there would be no end. Implication would substitute interpretation. This substitution, however, "[would not be] faithful either to our [the Supreme Courts'] precedents or our duty to interpret, rather than to revise, congressional commands." *Gebser*, 524 U.S. at 293, 118 S. Ct. at 2001 (Stevens, J., dissenting).

Worse still is the Petitioner's assertion that Congress' amendments of Title IX, Title VII and the Age Discrimination in Employment Act ("ADEA"), post-*Cannon v. University of Chicago* is evidence of its acceptance of implied causes of action under Title IX. Pet. Br. 15. In essence, the Petitioner has elevated Congress' inaction to wilful conduct and silence to acceptance. Yet, this Court has already cautioned against treating, "[congressional] silence as the equivalent of the broadest imaginable grant of remedial authority." *Franklin*, 503 U.S. at 78, 112 S. Ct. at 1039 (Scalia, J., concurring). Moreover, isolated amendments are not proof positive of congressional approval of the Court's statutory interpretation. *Alexander v. Sandoval*, 532 U.S. 278, 292, 121 S. Ct. 1511, 1523, 149 L. Ed. 2d 517 (2001).

As it stands, simultaneous broad interpretation and implication of rights would leave funding recipients flailing in the wind. The standard of "all appropriate relief" coupled with the standard of judicially implied causes of action would be an ambush. A funding recipient may face the risk of having their federal funds suspended or terminated, or be liable in money damages to the alleged victim, or face injunctive relief, or all four (4). Assuming the worst, institutions like the Board could conceivably lose their federal funds and still have to pay compensatory and punitive damages, all from one adverse judgment. Yet, Title IX's only express means of enforcement is through administrative agencies, and its only express remedy is the termination or suspension of its federal funds. 42 U.S.C. § 1681. At least under these provisions, the recipient has the benefit of an investigation by the OCR prior to any action being taken against it. In the Petitioner's version, recipients would not have the benefit of an investigation or any curative process whatsoever. Rather, recipients would be subjected to a strict liability regime where their federal funds and entire budgets would be at stake.

Title IX litigants already receive the benefit of foregoing the statute's administrative scheme and proceeding straight to court. This is a benefit that other victims of sex discrimination under Title VII do not have. *See West v. Gibson*, 527 U.S. 212, 119 S. Ct. 1906, 144 L. Ed. 2d 196 (1999). Title IX

litigants get a free pass and may immediately arm themselves with a lawsuit. Conversely, Title VII claimants must first file a complaint with the EEOC or risk having their federal law claims dismissed. *See* 42 U.S.C. § 2000e, *et seq.* In both instances, the victim has alleged sex discrimination, but the person under Title VII must exhaust all of their administrative remedies before proceeding to court. Immediate gratification for Title IX litigants after *Cannon* all but ignores the comprehensive administrative scheme of Title IX. *See Gebser*, 524 U.S. at 288, S. Ct. at 1999. This concern was noted by Justice Powell in his dissent in *Cannon*:

> [w]e have recognized in other contexts that implication of a private cause of action can frustrate those alternative processes that exist to resolve such disputes and, given the costs of federal litigation today, may dramatically revise the balance of interests struck by the legislation . . . That this concern applies fully to litigation under Title IX is borne out by the facts of this case.

Cannon, 441 U.S. at 748 n.19, 99 S. Ct. at 1984 n.19 (Powell, J., dissenting). This case will be no different. What plaintiff would elect to complain to the OCR if they could just shortcut to federal court and obtain the satisfaction of a money judgment? Surely, this was not contemplated by Congress in its creation of Title IX's administrative scheme, and should not be condoned by this Court.

2. *Pennhurst and its Progeny Do Not Permit Broad Interpretation of Spending Clause Statutes.* As a general rule, when Congress imposes a condition on a state's receipt of federal funds, it "must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). Moreover, legislation enacted pursuant to Congress' spending power is much in the nature of a contract: "the legitimacy of Congress' exercise of its power to condition funding on whether the State voluntarily and knowingly accepts the terms of the 'contract'." *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1540. Naturally, there can be "no knowing acceptance [of the terms of the putative contract]

if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1540. In turn, this Court has insisted that Congress "speak with a clear voice" so that states are "knowing and cognizant of the consequences of their participation." *Id.*

For its part, Title IX does not create a private cause of action, nor does it define the circumstances in which money damages are available. 20 U.S.C. § 1681. Instead, any and all private causes of action under Title IX are judicially implied. *See Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979). As private causes of action and damages are both judicially implied, the Court must inexorably indulge in a degree of speculation — much as it must with any right that is implied. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656, 119 S. Ct. 1661, 1677-78, 143 L. Ed. 2d 839 (1999) (Kennedy, J., dissenting), *quoting*, *Gebser*, 524 U.S. at 284, 118 S. Ct. 1989 (noting that, defining the scope of the private cause of action and the concomitant damages, "inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken."). Yet, when the statute at issue was enacted under the Spending Clause, as Title IX was, "this element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds." *Davis*, 526 U.S. at 656-57, 119 S. Ct. at 1678 (Kennedy, J., dissenting). Accordingly, this Court "must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability." *Davis*, 526 U.S. at 656, 119 S. Ct. at 1678. Thus, under contract terms, the recipient must have actual notice of the government's "offer" at the time that it "accepts." Consequently, the Department of Education's regulations may not qualify as actual notice under Spending Clause principles. *Davis*, 526 U.S. at 668, 119 S. Ct. at 1683 (Kennedy, J., dissenting).

The question then becomes, did the Board have actual notice? That is, did it knowingly and voluntarily accept federal money with the understanding that it would violate Title IX by retaliating against a male coach, who did not allege discrimination on the basis of his sex? The obvious answer is no. The Board did not have notice that its funding would be jeopardized by the above scenario. Nevertheless, a contract existed between the Board and the federal government and the terms seemed clear: by accepting the funds, the Board was precluded from discriminating against others "on the basis of sex." The implied rights doctrine via *Cannon*, *Franklin* and *Davis* would alter the terms of this contract, however, to include retaliation–a term which is not expressly written into the contract, but rather is implied. The Board could have no notice that it would breach this contract by allegedly retaliating against a male coach. However, the standard for Spending Clause statutes is actual notice. Thus, liability by implication runs contrary to the actual notice standard under the Spending Clause. Relatively little notice, if any, may be said to exist where the terms and remedies are only implied. *See Davis*, 526 U.S. at 656, 119 S. Ct. at 1677-78. Implied rights of action and actual notice, then, are strange bedfellows. At least one Justice has recognized this tension by espousing that actual notice and implied rights are "neither sensible nor faithful to Spending Clause principles." *Davis*, 526 U.S. at 657, 119 S. Ct. at 1678. (Kennedy, J., dissenting).

Title IX's contractual nature, then, has real implications for the Court's construction of the scope of available remedies. *Barnes v. Gorman*, 536 U.S. 181, 187, 122 S. Ct. 2097, 2101, 153 L. Ed. 2d 230 (2002). This includes placing practical limits on the application of its appropriate relief standard. For instance, since punitive damages are not available for breach of contract actions, neither should they be available against a funding recipient under Title IX. *See Barnes*, 536 U.S. at 187-88, 122 S. Ct. at 2102 (holding that punitive damages are not available under Title IX). Nor may punitive damages be implied under Title IX. *Id.* Still, gleaning an implied remedy from an implied

cause of action is boundless. This Court has already expressed its concern regarding remedies under implied causes of action:

> [w]e have acknowledged that compensatory damages alone might well exceed a recipients level of funding, punitive damages on top of that could well be disastrous. Not only is it doubtful that funding recipients would have agreed to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages was a required condition.

Id. at 188 (emphasis in original). Moreover, a finding of Congressional intent to impose conditions on federal funding is heightened where a recipient's potential obligations are "legally indeterminate," as they currently are for implied rights. *See Pennhurst*, 451 U.S. at 24, 101 S. Ct. at 1543.

Here, the Board's liability would be unlimited or "legally indeterminate" if an implied right of action is found. Not only would this be violative of traditional Spending Clause principles, but it would also be a breach of contract for the judiciary – assuming it is a party to said contract – to insert an additional term by implication, and of which the Board was not originally aware. The question of whether the Board would have accepted federal funds if it would have known of its liability to indirect victims of discrimination for retaliation is a speculative, "no." The speculation of this answer is no more speculative than inferring a private cause of action from a Spending Clause statute. Still, the Court must resolve whether the Board was on notice at the time it accepted federal money that it would be liable under Title IX for allegedly engaging in conduct not prohibited by the statute, namely retaliation. The Court must also resolve whether the Board had notice that its alleged retaliation against a male coach – an indirect victim – who complained about discriminatory treatment of others violated Title IX. The Board's response to these necessary inquiries is also "no." The Board did not have "clear and unambiguous" notice that it would be liable in

damages for allegedly retaliating against a person whom it did not discriminate against on the basis of his sex.

Still, the standard remains that Congress must speak with a "clear voice" on the conditions it places on federal funds. If the Court has to imply a cause of action only to then imply a remedy, this is evidence that Congress did not speak with the requisite clarity. Instead, it has spoken with whispers and double entendres. To impose liability upon the Board under these circumstances would "impose on [it] liability that was unexpected and unknown, [and the] contours of which are, as yet, unknowable." *See Davis*, 526 U.S. at 657, 119 S. Ct. at 1678.

III. THE REGULATIONS ARE CONTRARY TO THE EXPRESS TERMS OF TITLE IX AND ARE NOT DUE TO BE ENFORCED

Congress authorized certain governmental agencies to "effectuate the provisions of 20 U.S.C. § 1681 . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682. The U.S. Department of Education, through the OCR, promulgated 34 C.F.R. § 100.7(e), a regulation which prohibits retaliation against any person who complains that an education program is not in compliance with Title IX. 34 C.F.R. § 100.7(e).[5] This regulation is an adoption of a similar regulation from Title VI. Regulations, however, may only "construe the statute itself" (*Nations Bank of N.C., N.A. v. Variable Annuity Life Ins.* Co., 513 U.S. 251, 257, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995)), and a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of the statute." *Central Bank of Denver, N.A. v. First Interest Bank of Denver*, N.A., 511 U.S. 164, 173, 114 S. Ct. 1439, 1446, 128 L. Ed. 2d 119 (1994); *see also, Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522, 149 L. Ed. 2d 517 (2001) (noting that, "language in a regulation may invoke a private right of action that Congress through

5. 34 C.F.R. § 100.7(e) was originally promulgated to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.*, but it has been incorporated by reference to enforce Title IX. *See* 34 C.F.R. § 106.71.

statutory text created, but it may not create a right that Congress did not."). As has been recognized by many courts, Titles VI and IX are in *pari materia* such that cases interpreting Title VI and Title IX may be used interchangeably in analyzing similar issues. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1339 (11th Cir. 2002). Still, analogies to Title VI should be made carefully. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529, 102 S. Ct. 1912, 1957, 72 L. Ed. 2d 299 (1982); *Cannon*, 441 U.S. at 725-26, 99 S. Ct. at 1972-73 (White, J., dissenting) (noting that, "an erroneous interpretation of Title VI should not be compounded through importation into Title IX under the guise of effectuating legislative intent.").

The genesis of the Petitioner's claim for a private cause of action for retaliation under Title IX is not Congress. Rather, it is born out of a federal agency – namely the Department of Health, Education and Welfare ("HEW") and later, the Department of Education – exceeding its congressional grant of authority to implement the statute. Instead of implementing Title IX, they have attempted to create law through a regulation. The specific regulation at issue bars a recipient of federal funding from retaliating against a person who complains of gender discrimination in violation of Title IX. *See* 34 C.F.R. § 100.7(e).

Title IX, however, makes no reference whatsoever to retaliation. 20 U.S.C. § 1681, *et seq.* In the short paragraph that comprises the pith of Title IX, the word "retaliation" is nowhere to be found. 20 U.S.C. § 1681. The prohibition against retaliation is found only in the regulations for Title VI. 34 C.F.R. § 100.7(e). Accordingly, the reach of the regulation has extended beyond the grasp of Title IX since it makes conduct unlawful that would not otherwise be unlawful under the actual statute. It is well-settled that no private right of action exists where it is born out of a regulation rather than the actual statute. *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522 (noting that, "it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress"). As stated by this Court in *Dixon v. United States*, "the rulemaking power granted to an

administrative agency charged with the administration of a federal statute is not the power to make law." 381 U.S. 68, 74, 85 S. Ct. 1301, 1305, 14 L. Ed. 2d 223 (1965), *quoting, Manhattan Gen. Equip. Co., v. Comm'r*, 297 U.S. 129, 134, 56 S. Ct. 397, 400, 80 L. Ed. 528 (1936). Yet, penning an anti-retaliation provision into the regulations of Title IX eclipses mere interpretation and is an attempt by the agency to make law. *E.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 577, 99 S. Ct. 2479, 61 L. Ed. 2d 82 n.18 (1979). Thus, to the extent that the Department of Education's regulations do more than just interpret Title IX or have created a rule out of harmony with the statute, they are a "mere nullity." *Manhattan Gen. Equip. Co.*, 297 U.S. at 134, 85 S. Ct. at 400. Specifically, 100.7(e) is out of harmony with Title IX, and as such, is not entitled to deference by this Court. As it stands, the retaliatory conduct of which the Petitioner complains would violate only the regulation, and would not violate Title IX. In turn, no right may be enforced from it by the Petitioner, and there can be no Title IX violation nor entitlement to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

A. THE REGULATIONS DO NOT DESERVE ANY DEFERENCE

The Petitioner asserts that the regulations are interpretations of Title IX, and thus deserve deference. Pet. App. 27. *Chevron*, 467 U.S. at 842-44. As discussed above, the regulations are outside of the scope of Title IX. Therefore, the subject regulations cannot be treated as an interpretation of the statute. Furthermore, Title IX does not require additional interpretation from the regulations as it is clear on its face. The Petitioner also argues that the regulations deserve deference because Congress has not acted against them. Pet. App. 27, 29-31. *Sandoval* established that Congress' silence towards regulations does not equal an approval of the same. 532 U.S. 275, 121 S. Ct. 1511.

1. *Title IX Is Not Ambiguous, Therefore, the Regulations Are Not Entitled to Chevron Deference.* In *Chevron*, this Court stated that where a statute is ambiguous, the Court will rely on the

administrative agency's interpretation of the statute in construing the statute. 467 U.S. at 842-43, 104 S. Ct. at 2781-82. The Petitioner states that there may be some ambiguity as to whether Title IX's prohibition of discrimination includes retaliation. Pet. App. 26-27. No such ambiguity exists here. The statute clearly describes the type of discrimination to be prohibited, and retaliation against third-party complainers is not included. In *Sandoval*, the Court did not find that the statute was unclear on whether Title VI created a private cause of action for disparate-impact discrimination. 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). The statute simply did not speak to or include such an action. Therefore, there was no ambiguity or need to defer to the regulations. Similarly, there is no ambiguity as to whether Title IX creates a private cause of action for retaliation. The statute simply does not even purport to prohibit such practices. Furthermore, regulations that construe the statute in an impermissible manner are not entitled to deference even where there is ambiguity. *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782. The Petitioner's interpretation of the regulations would yield an impermissible construction of the statute. The Eleventh Circuit was correct in following the *Sandoval* model and not extending any deference to the regulations on this issue.

2. *The Regulations Are Not Entitled to Deference Simply Because Congress Has Not Acted Against Them.* In *Sandoval*, this Court gave little credence to congressional inaction. 532 U.S. at 292-93, 121 S. Ct. at 1523. The Petitioner advances the argument that the regulations deserve deference, separate and apart from *Chevron*, because Congress had the opportunity to reject or modify them and it did not do so. Pet. App. 27, 29-31. The Petitioner's argument is questionable given this Court's rejection of a similar argument in *Sandoval* where it was argued that congressional inaction somehow "ratified" judicial decisions, allowing for disparate-impact claims under Title VI. 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). This Court was not persuaded by this same argument in *Sandoval*, finding that "when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated

amendments, we have spoken more bluntly: It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." 532 U.S. at 292-93, 121 S. Ct. at 1523. In light of this language in *Sandoval*, it was reasonable and proper for the Court of Appeals not to extend any deference to the regulations.

Sandoval is sound jurisprudence regarding statutory construction. The Eleventh Circuit properly applied the framework in *Sandoval* in holding that the text of Title IX does not create a private cause of action for retaliation. Furthermore, the Eleventh Circuit gave the proper deference — none — to the regulations in holding that they do not create a private cause of action for retaliation. As such, the judgment of the Eleventh Circuit should be affirmed.

B. EVEN UNDER THE REGULATIONS, THE PETITIONER DOES NOT HAVE THE REQUISITE STANDING TO ENFORCE A RETALIATION CLAIM UNDER TITLE IX

According to the Petitioner, this case is about the scope of an implied right already recognized rather than the creation or expansion of a right. Pet. Br. 10-11. This statement, however, is contradicted by the unlimited purview of the Question Presented: "Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination." Pet. Br. i. By asking whether Title IX affords relief for retaliation is to first assume that retaliation is even cognizable under Title IX. This is tantamount to placing the cart before the horse since it skips a vital analytical step: to assume a right to relief is to assume that a right has been violated. Yet, as evident from the face of Title IX, no right of the Petitioner has been violated.

At this time, any right asserted by the Petitioner exists through the grace of implication and a single regulation.

Since he seeks relief from a cause of action whose existence, to date, remains unproven, this question has already been answered by the Eleventh Circuit in the negative. Pet. App. 2a. A similar negative response may be gleaned from this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) – which was the basis of the Eleventh Circuit's ruling in *Jackson* – and subsequent district court opinions that have followed *Sandoval*.[6] The Petitioner's question, however, is a loaded one. To answer affirmatively is to open the door to indirect victims of discrimination, seemingly without limitation. It would also erase the only bright line under the statute, that is, the "on the basis of sex" requirement.

In *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002), the Eleventh Circuit was faced with an issue of first impression, namely, whether an implied right of action for retaliation existed under Title IX. The court stated the issue more succinctly, as follows:

> The question before us is whether Title IX implies a private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others.

Pet. App. 2a. This appears to be a more accurate depiction of the issues than the myopic question advanced by the Petitioner today. Nevertheless, before the Eleventh Circuit could attempt to define the parameters of the right asserted by the Petitioner, it had to first consider whether the right even existed. What the Petitioner advanced was an inference – upon a presumption – upon an inference approach: for the Eleventh Circuit to first infer that a retaliation claim could be implied, only to then presume that indirect victims like himself were protected, and lastly,

6. *See Mock v. South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017, 1018 (D.S.D. 2003); *see also, Atkinson v. Lafayette College*, 2002 WL 123449 at *11 (E.D. Pa. Jan. 29, 2002).

to imply that he was entitled to redress. Again, with this Court's decision in *Sandoval* as a guide, the Eleventh Circuit's response was a resounding no, as set forth below:

> In *Cannon*, however, the Supreme Court had no occasion to address the question before us today: whether Title IX implies a private right of action to redress retaliation resulting from Title IX complaints or whether individuals other than direct victims of gender discrimination have any private rights under Title IX at all. Nor has any subsequent decision of the Supreme Court or this Court resolved these questions. We therefore face the basic question of whether to imply a private right of action and a private remedy for retaliation in favor of an individual who is not himself a direct victim of gender discrimination. After reading Title IX in the manner required by *Sandoval*, we can find nothing in the language or structure of Title IX creating a private cause of action for retaliation, let alone a private cause of action for retaliation against individuals other than direct victims of gender discrimination.

Pet. App. 19a.

Consequently, the question posed by the Petitioner is only part of the issue. Couched in this question is an alternative query: whether the private right of action for violations of Title IX encompasses a claim for retaliation from complaints by indirect victims about unlawful sex discrimination against others. Again, the Eleventh Circuit's response was "no". Specifically, the Eleventh Circuit held that, as an indirect victim of discrimination, the Petitioner had no implied or private cause of action under Title IX for discrimination "on the basis of sex." Accordingly, not only did the Petitioner's claim fail the fundamental "on the basis of sex" criterion, it also failed on the issue of standing since he was an "indirect victim" of discrimination. Indirect victims of discrimination were not protected by Title IX. 309 F. 3d at 1347.

The Eleventh Circuit, steadfast to the actual terms of the statute, simply refused the Petitioner's invitation to traverse a slippery slope, that is, to allow an indirect victim to prevail where a direct victim could not do so. The text of the statute did not allow it, so the Eleventh Circuit would not enforce it. Pet. App. 25a ("we simply cannot imply a private right of action, no matter how desirable the result may be."). Thus, the Petitioner did not have standing under the statute, nor did he have standing under the regulations. Based on the Eleventh Circuit's reasoning, indirect victims did not have standing, either under Title IX or its regulations. The benefit of Title IX and its regulations, then, remained vested in direct victims, rather than indirect victims or bystanders like the Petitioner.

The Eleventh Circuit further recognized, as follows, the inherent dangers of expanding the class of beneficiaries under Title IX to persons twice and thrice-removed from actual victims of gender discrimination:

> . . . Jackson is plainly not within the class meant to be protected by Title IX. Nowhere in the text . . . is any mention made of individuals *other* than victims of gender discrimination. Gender discrimination affects not only its direct victims, but also those who care for, instruct, or are affiliated with them – parents, teachers, coaches, friends, significant others, and coworkers. Congress could have easily provided some protection or form of relief to these interested individuals had it chosen to do so – but it did not do so expressly. Nor does any language in § 902 evince an intent to protect anyone other than direct victims of gender discrimination. Indeed, as with § 602 of Title VI, the focus of § 902 is "twice removed" from victims of gender discrimination, *Sandoval*, 532 U.S. at 289, 121 S. Ct. at 1521, and, consequently, thrice-removed from individuals like Jackson who are not themselves the victims of gender discrimination. Here, there is quite simply no indication of any kind that

> Congress meant to extend Title IX's coverage to individuals other than direct victims of gender discrimination.

Pet. App. 23a-24a. Clearly then, indirect victims like the Petitioner have no cognizable right for retaliation under Title IX. They, however, may find solace in other statutes, such as 42 U.S.C. § 1983 or Title VII, where appropriate. *See Cannon*, 441 U.S. at 723-725, 99 S. Ct. at 1971-1972 (Powell, J., dissenting).

Without a distinction between direct and indirect victims, recipients of federal funds – like the Board – will face double and triple exposure as disgruntled employees file lawsuits under the guise of whistle-blowing. Actual victims, in turn, will receive no redress for their actual harm. Whistle-blowers would receive judgments, and the actual victims would be subject to res judicata. Moreover, the Board would be held to be in violation of Title IX, and face the real risk of losing federal funds for engaging in conduct that is far removed from the "on the basis of sex" standard. The "on the basis of sex" standard would be transmuted to an "on the basis of anything" standard. Any and every employee could file a lawsuit based on their observations rather than their personal injury or harm. Standing under Title IX would open wide to embrace any employee who ever complained about someone else's troubles, whether real or imagined. The Board, in turn, would be faced with crushing financial liability for violating an imagined right asserted by an indirect victim. Certainly, Congress did not intend for Title IX to devolve into a catch-all statute, such as the Petitioner envisions.

IV. CONGRESS DID NOT INTEND TO CREATE AN IMPLIED PRIVATE RIGHT OF ACTION UNDER TITLE IX FOR RETALIATION

The Petitioner can recover under Title IX only if he can establish congressional intent to create an implied private right of action against retaliation. It is undisputed that Title IX does not create an express private right of action or private remedy of any kind. An implied private right of action for direct

discrimination was recognized by this Court in *Cannon v. University of Chicago*, 441 U.S. 677, 717, 99 S. Ct. 1946, 1968 (1979). This implied remedy was later extended to include monetary damage remedies in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 77, 112 S. Ct. 1028, 1039, 117 L. Ed. 2d 208 (1992). This Court has not, however, similarly extended the statute to create an implied remedy for retaliation against one who is not a direct victim of gender discrimination.

A. THE TEXT OF § 901 BELIES ANY INTENT TO CREATE AN IMPLIED PRIVATE RIGHT OF ACTION FOR RETALIATION

The analysis in this case can begin and end with the text of the statute. Section 901, the only section that creates any private rights, does not prohibit retaliation for opposing gender discrimination. Section 901 provides, in pertinent part, that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). Clearly, this section says nothing about retaliation, and instead applies only to persons who are discriminated against on the basis of sex. The Petitioner was not discriminated against on the basis of sex, nor does he claim that he was.[7] *Jackson*, 309 F.3d at 1335. Rather, his sole claim is that he was subjected to retaliation for complaining about alleged discrimination against members of the girls basketball team.

Because Congressional intent is the only permissible basis for creating implied private rights, the definition of covered rights in § 901 is of paramount importance. Although this Court has interpreted § 901 to include implied rights and remedies, it has been careful not to extend the scope of those rights beyond the discrimination prohibited

7. That fact distinguishes this case from most of the cases cited by the Petitioner where a student claims both direct discrimination and retaliation for complaining about the original discrimination.

in the text of the statute. That is, the Court has not gone far afield to create additional rights or classes of beneficiaries not described in the statute itself.

This Court's holding in *Davis v. Monroe County Bd. of Educ.*, dictates a cautious approach to implied rights, and does not justify judicial creation of the broad right against retaliation sought by the Petitioner. 526 U.S. at 650-51, 119 S. Ct. 1675 (1999). A broad prohibition against retaliation would exceed the scope of the statute and result in judicial creation of a right that Congress did not intend. The role of the judiciary is to interpret only those rights which Congress intended to create, not to create new rights. This is the case no matter how desirable the result or how consistent with the policy goals of the statute.

As noted by the Eleventh Circuit in *Jackson*, the text of § 901 does not prohibit retaliation or imply any such prohibition. 309 F.3d at 1344. Therefore, the Eleventh Circuit refused to create a new right and construed its task as merely,

> to interpret what Congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct.

Jackson, 309 F.3d at 1344-45. This conclusion is reinforced by the contrast between Title IX and Title VII, the latter which contains an express prohibition against retaliation. 42 U.S.C. § 2000e-3(a). Clearly Congress knew how to prohibit retaliation when it so chose, militating against an implied prohibition.[8] It may be safely assumed, therefore, that Congress chose not to create a similar prohibition against retaliation in Title IX.

8. Unlike "sexual harassment," "retaliation" is not a subset of discrimination, which is a point made clear by the fact that Title VII contains specific language defining discrimination to include retaliation. No such language exists in Title IX.

B. THE STRUCTURE OF TITLE IX AND THE EXISTENCE OF AN EXPRESS ADMINISTRATIVE REMEDY MILITATE AGAINST AN IMPLIED REMEDY

The structure of Title IX also weighs against an implied remedy for retaliation 20 U.S.C. § 1681. That is, the statute already contains an express administrative remedy. 20 U.S.C. § 1681. The Department of Education enforces the provisions of Title IX through an administrative process that they culminate in a complete denial of federal funds to an entity in violation of Title IX. This structure suggests that Congress – by providing an express remedy – meant to preclude other remedies not specifically listed. *E.g., National R. R. Passenger Corp. v. National Assn. of R. R. Passengers*, 414 U.S. 45, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974) (Ct. Refused to imply private right because administrative remedy was expressly available. Although some implied remedies have been recognized, the structure of Title IX and its express administrative remedies caution against any further expansion of implied remedies.

In sum, the text of § 901 and the structure of Title IX clearly establish that Congress did not intend to create a private right of action for retaliation. The *Sandoval* analysis compels the conclusion that no basis exists for the courts to create an implied right of action for retaliation, and the decision below is correct.

V. THIS COURT'S HOLDING IN *ALEXANDER v. SANDOVAL* IS CONTROLLING

Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), serves as the most recent guidepost for statutory construction. Specifically, *Sandoval* addresses the interpretation of statutes when implied causes of action are at issue. Relying on this precedent, the Eleventh Circuit held that neither the text nor the structure of Title IX indicates that Congress intended the statute to provide a private cause of action for retaliation. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1345 (11th Cir. 2002). Moreover, the Eleventh

Circuit was not persuaded that § 902 added any weight to the Petitioner's contention that he has a cause of action for retaliation.

A. *SANDOVAL* REVEALS THAT CONGRESS DID NOT INTEND TO CREATE A PRIVATE CAUSE OF ACTION FOR RETALIATION

The statute interpreted in *Sandoval* was Title VI. There, the issue was whether Title VI, or the regulations promulgated pursuant to § 602 of Title VI, created a private cause of action for disparate-impact discrimination. Here, the issue is whether Title IX, or the regulations promulgated pursuant to § 902, create a private cause of action for retaliation. Petitioner asserts that *Sandoval* has no bearing on this case because of these differences. However, it has been the long-standing opinion of this Court that Title VI serves as the model for Title IX. *Cannon v. University of Chicago*, 441 U.S. 677, 694-95, 99 S. Ct. 1946, 1956-57, 60 L. Ed. 2d 560 (1979) ("Title IX was patterned after Title VI. . . . Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefitted class."). Furthermore, this Court did not limit the steps to utilize in statutory analysis to Title VI only. In fact, this Court and other Circuit Courts of Appeal, have relied on the framework in *Sandoval* to construe other statutes. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S. Ct. 2267, 2275-76, 153 L. Ed. 2d 309 (2002) (construing § 1983 and the Family Educational Rights and Privacy Act); *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (construing the Digital Millennium Copyright Act); *Walls v. Wells Fargo Bank*, 276 F.3d 502, 508 (9th Cir. 2002) (construing the Fair Debt Collection Practice Act). As such, the Eleventh Circuit correctly deemed *Sandoval*'s interpretation of Title VI and its regulations to control its interpretation of Title IX and its regulations.

In *Sandoval*, this Court began-and ended-its interpretation of whether § 602 of Title VI created a private

cause of action for disparate-impact discrimination by examining the text and the structure of the statute. This examination was mainly pursued to evince any intent on the part of Congress to create such an action. *Sandoval*, 532 U.S. at 288-89, 121 S. Ct. at 1520-21. This Court found that § 602, which allowed federal agencies to issue rules, regulations or orders to effectuate the statute, did not contain any rights-creating language, nor did it reference a class of persons to benefit under the statute. *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 5171 (2001). Rights-creating language, then, is essential to infer Congressional intent to bestow the right to pursue a cause of action.

The Eleventh Circuit also examined § 902 for any rights-creating language, and found none. In a manner similar to § 602, § 902 simply allows federal agencies to create rules and regulations provided such does not conflict with Congress' intent. *See* 20 U.S.C. § 1682. The text and structure of Title IX are devoid of any Congressional intent to create a private cause of action for retaliation or any other discriminatory practices. Furthermore, in its authorization of agencies to promulgate rules, the Section does not refer to any class of people to benefit from the rules. Therefore, the Eleventh Circuit was correct in holding that no evidence existed in § 902 that Congress intended to create a private right of action for retaliation.

B. THE REGULATION CITED BY PETITIONER IS FAR LESS ENCOMPASSING OF TITLE IX THAN THE REGULATION INVOLVED IN *SANDOVAL* IS OF TITLE VI

Title VI's regulations begin by setting forth a general prohibition against discrimination: "No person in the United States shall, on the ground of race, color, or national origin ... be otherwise subjected to discrimination ..." 28 C.F.R. § 42.104(a). The language in the regulation is strikingly similar to the rights-creating portion or text of Title VI, § 601. The regulation then lists in subsection (b)(1) specific discriminatory acts that are prohibited by the

regulation. Despite the regulation's similarities to the actual statute and its specificity in defining discrimination, this Court held that the regulation did not create a private cause of action. *See Sandavol*, 532 U.S. at 292, 121 S. Ct. at 1522.

The Petitioner relies mainly upon the Department of Education's regulation, 34 C.F.R. § 100.7. This regulation does not encompass Title IX's statutory scheme. The rights-creating portion of Title IX §, 901, provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." Unlike Title VI's regulations, Title IX's regulations do not incorporate any language from the actual text of the statute. *See* 28 C.F.R. § 42.104; *compare* 34 C.F.R. § 100.7. In fact, the subject of the regulation is how the Department of Education should conduct its investigation of possible violations of Title IX. 34 C.F.R.§. 100.7(e). The Petitioner has practically ignored that this regulation deals almost exclusively with the investigatory process and the administrative scheme of Title IX and not discriminatory practices or retaliation. Furthermore, there are limited references – without definitions, examples, or explanations – to the conduct of recipients and the rights of employees. 34 C.F.R. § 100.7(e). The subsection of particular interest to the Petitioner is subsection (e) of 24 U.S.C. § 100.7. This Section of the regulation bears the title "Intimidatory or retaliatory acts prohibited." 34 C.F.R. § 100.7(e). However, this Section does not even purport to define retaliation or discrimination. Additionally, neither this section nor the entire regulation mentions "sex" or "gender," which are key terms to a Title IX lawsuit since they define the class of beneficiaries to be protected under the statute.

In *Sandoval*, this Court found that no private right of action can exist where there is no rights-creating or beneficiary language.

> Statutes that focus on the person regulated rather than the individuals protected create 'no

> implication of an intent to confer rights on a particular class of persons.' Section 602 is yet a step further removed: It focuses *neither on individuals protected nor even on the funding recipients being regulated*, but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn., Inc. v. Coutu*, § 602 is 'phrased as a directive to federal agencies engaged in the distribution of public funds.' *Id.*, at 772, 101 S. Ct. 1451. *When this is true, '[t]here is far less reason to infer a private remedy in favor of individual persons.'*

Sandoval, 532 U.S. at 289, 121 S. Ct. at 1521 (internal citations omitted). Although the passage quoted above discusses the absence of rights-creating language in the actual statute, the same can be said of the regulations promulgated pursuant to the statute. The Department of Education's regulation does not focus on the benefitting class or funding recipients. Rather, the focus is on the Department itself and its administrative procedures. Under a *Sandoval* analysis, it cannot be found that this regulation bestows any right to a private cause of action for discrimination.

C. PETITIONER SEEKS TO EXTEND THE REGULATION BEYOND THE STATUTE

It is evident from the absence of a prohibition against retaliation in Title IX, and the absence of Title IX's statutory scheme within 34 C.F.R. § 100.7, that the regulation is outside of the scope of Title IX. The Petitioner's argument that the regulation creates a private cause of action for retaliation under Title IX is an impermissible extension of the statute. Whether the regulation actually speaks to retaliation and discrimination is debatable. Assuming that it does, the Petitioner still cannot overcome the fact that the statute itself does not contain such a prohibition. In *Sandoval*, this Court stated that a regulation cannot create a right that is not pre-existing in the statute or one that has not been approved by Congress. *Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522, 149 L. Ed. 2d 517 (2001). "But it is most certainly

incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice, but not the sorcerer himself." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522. Relating back to § 902, the Department of Education was authorized under this Section to create rules to enforce Title IX. However, the Department was not authorized to create private causes of actions in the regulations that go beyond what the statute requires or intended. The regulation, as interpreted by the Petitioner, goes beyond what is proscribed under Title IX. Therefore, any private cause of action, implied or otherwise, gleaned from the regulation would be a stretch of Title IX without Congress' approval. This attempt to unilaterally amend the statute is violative of this Court's holding in *Sandoval*.

This Court has previously expressed its reluctance to extend statute's beyond the scope prescribed by Congress. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 600-601, 71 S. Ct. 515, 520, 95 L. Ed. 566 (1951) (stating that "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute [Federal Food, Drug and Cosmetic Act] beyond the point where Congress indicated it would stop"); *see also, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177, 114 S. Ct. 1439, 1448, 128 L. Ed. 2d 119 (1994) (stating that "[i]t is inconsistent with settled methodology in §§ 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text"); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S. Ct. 1291, 1315-16, 146 L. Ed. 2d 121 (2000) stating that

> no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable ... an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress ... we must take care

not to extend the scope of the statute beyond the point where Congress indicated it would stop.

This Court should maintain its reluctance in extending the scope of Title IX through the regulations as requested by the Petitioner. This impermissible extension of the statute would essentially allow plaintiffs, who are not in the beneficiary class of Title IX, to bring actions for "retaliation" without proving any actual discrimination. The effect upon school boards would be disastrous. The increased exposure to liability would hamper school boards' authority to make necessary employment actions for fear of Title IX lawsuits alleging retaliation. In following the framework provided in *Sandoval*, the Eleventh Circuit held that the regulations could do no more than the actual statute, and effectively maintained the scope of Title IX as intended by Congress.

D. OTHER JURISDICTIONS HAVE ADOPTED AN APPLICATION OF *SANDOVAL* IDENTICAL OR SIMILAR TO THAT OF THE ELEVENTH CIRCUIT

The Petitioner would have this Court believe that the Eleventh Circuit's application of *Sandoval* is the only one of its kind. This is not true. District courts, as well as dissenters from circuit courts, have adopted the Eleventh Circuit's analysis either in whole or in part and held that a cause of action for retaliation does not exist under Titles IX or VI.

1. *The United States District Court for the District of South Dakota Adopted the Eleventh Circuit's Application of Sandoval.* In *Mock v. South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017, 1018 (D.S.D. 2003). The court adhered to the Eleventh Circuit's *Jackson* decision, holding that Title IX does not provide a private cause of action for retaliation. In so doing, the court refuted *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2001), and its discord with *Jackson*. *Mock*, 267 F. Supp. 2d at 1020-22. First, the court stated that the Fourth Circuit's holding that Title VI needed no express provision for retaliation in light of *Sullivan* was wrong because Title VI was enacted prior to *Sullivan*. Second, the court stated that the Fourth Circuit, unlike the Eleventh Circuit, did not address the

inference that, if Congress made express prohibitions for retaliation in statutes such as Title VII, than it could have also done so for Title VI and Title IX. The absence of such provisions in Title IX lent credence to the fact that Congress' intent to prohibit retaliation was proven through the text and structure of the statute. The court's third and fourth difficulties with *Peters* was that the Fourth Circuit relied heavily on *Cannon* and *Sullivan*'s language regarding implied rights of action, but did not consider those cases in light of the Supreme Court's most recent holding in *Sandoval*. *Mock*, 267 F. Supp. 2d at 1021-22. The court stated that *Sandoval* "is the proper approach to analyzing implied private rights of action and the Eleventh Circuit's decision in *Jackson* properly applied to that approach." *Mock*, 267 F. Supp. 2d at 1022.

2. *The United States District Court for the Eastern District of Pennsylvania applied an Analysis of Sandoval Similar to That of the Eleventh Circuit.* In *Atkinson v. Lafayette College*, 2002 WL 123449, (E.D. Pa. Jan. 29, 2002). The court gave *Sandoval* the same treatment as the Eleventh Circuit. In *Atkinson*, the plaintiff alleged that the college retaliated against her in violation of Title IX when she was terminated after raising concerns regarding gender equality. She sued for retaliation and discrimination pursuant to Title IX. Like the Petitioner, the plaintiff in *Atkinson* argued that the regulations provided for this private cause of action. The court held that a *Sandoval* analysis of Title IX dictated that there was no such action under Title IX. The court then stated that its analysis had to begin by examining the text and the structure of Title IX for evidence of Congressional intent to create a private right of action to enforce the anti-retaliation regulation. The court examined § 902 of Title IX and held that the text of this section did not show that Congress intended to create a private right to enforce 34 C.F.R. § 100.7(e). The court stated that § 902 differs from § 901 – which states that no person shall be discriminated against on the basis of sex. The difference is that § 901 refers to a class of people to receive a benefit from the statute, whereas § 902 does not refer to those benefitting from the statute's protection. Therefore,

§ 901 shows that Congress intended to create a private cause of action for discrimination on the basis of sex, and § 902 simply creates an enforcement mechanism. This enforcement mechanism, however, did not create a prohibition of retaliation under Title IX.

According to the court, although, the regulation is presumed to be valid, but it cannot create a private cause of action because the text and the structure of the actual statute do not confer this benefit. The court noted that, although there are several pre-*Sandoval* cases which concluded that Title IX does include a private cause of action for retaliation, these cases, according to the court, are not in line with *Sandoval*'s holding that, "[l]anguage in a regulation may invoke a private right of action that Congress, through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522.

3. *Fourth Circuit Is Not Unanimous in its Holding That Title VI Creates a Private Cause of Action for Retaliation.* There is even some dissension within the Fourth Circuit as to whether a private cause of action for retaliation exists under Title VI. In *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), a case relied on by the Petitioner and many of his supporting *amici*, Judge Widener dissented from the majority opinion's rejection of *Jackson* in holding that a private cause of action for retaliation exists under Title VI. *Peters*, 327 F.3d at 324 (Widener, J., dissenting). In his dissent, Judge Widener stated that he agreed with the Eleventh Circuit's conclusions that third-party complainers are not within the benefitted class of persons under Title IX, and that a private right of action for retaliation does not exist under the statute given this Court's directions in *Sandoval*. *Peters*, 327 F.3d at 326 (Widener, J. dissenting). In opining that no private cause of action for retaliation exists under Title VI, the dissent reiterated the holdings in *Sandoval* that "for a private right for retaliation to exist it must be found in the statute created by Congress," and that courts may not create a private cause of action, no matter how desirable, without evidence of congressional intent. *Peters*, 327 F.3d at 324-326 (Widener, J.

dissenting). The dissent adopted the Eleventh Circuit's holding that "the text and the structure of Title IX yields no congressional intent to create a cause of action for retaliation. . . ." *Id.* at 325.

> *Jackson* was a Title IX case, while *Sandoval*, as is the case at hand, was a Title VI case. On the authority of *Cannon*, 441 U.S. at 694-95, 99 S. Ct. 1946, the *Jackson* court read Titles VI and Title IX *in pari materia* as do I. . . . *On that account, the holding in Jackson, that there is no cause of action for retaliation is, for all practical purposes, the holding of a sister circuit on the same question, contrary to the decision of the majority in this case.*

Id. at 326 (Widener, J. dissenting). According to the dissent, *Peters*, and not *Jackson*, is the renegade opinion and is out of line with *Sandoval*.

The Petitioner further cites to *Peters* for the proposition that there is an implied right of action for retaliation.[9] *Peters*,

9. Despite suggestions of "near-consensus in the federal circuit courts," there are really only three cases–this case, *Peters*, and *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997), a Fifth Circuit decision prior to *Sandoval* – that have squarely addressed whether Title IX created an implied private right of action for retaliation against someone other than the victim of gender discrimination. The other cases cited by the Petitioner are of marginal relevance because they contain no detailed analysis to support an implied right of action and because they ultimately rejected the retaliation claims at issue. The additional cases that ate cited by Petitioner are:

Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 251 (2d Cir. 1995), was decided prior to *Sandoval* and involved a retaliation claim by a dental student who also claimed to be a direct victim of sexual harassment. The opinion assumed that there was a cognizable claim for retaliation, but did not cite any authority for that position nor perform any analysis on the threshold question. It affirmed a dismissal of all claims, including direct discrimination and retaliation.

Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 67 (1st Cir. 2002), also involved a student who asserted claims for direct discrimination and retaliation. That court assumed, also without analysis or citation to authority, that a Title IX retaliation claim involved the same elements as a Title VII retaliation claim. This opinion ultimately affirmed dismissal on the basis that the complaint did not allege facts sufficient to support either Title IX claim – the retaliation claim or the direct discrimination claim.

which was a Title VI case, does not establish such an implied right and pays only lip service to the *Sandoval* analysis. *Peters* did not analyze in depth whether Congress intended to create an implied right against retaliation, but focused primarily on 34 C.F.R. § 100.7(e) as an interpretative regulation that somehow defined "retaliation" as an implicit component of prohibited discrimination. This regulation, however, is not an interpretative regulation, and thus, it cannot validly expand the scope of the statute. *Peters* also relied heavily on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969), for the proposition that retaliation is implicit in civil rights statutes. Significantly, *Peters* was decided after the Eleventh Circuit's opinion in this case, yet the majority opinion barely acknowledges it. Instead, it discusses *Jackson* only in a single footnote. *Peters*, 327 F.3d at 318, n. 10.

The Petitioner seeks to limit *Sandoval* to disparate impact cases, Pet. Br. 10, but fails to acknowledge its more fundamental holdings, that (i) the intent of Congress is the primary desideratum for analyzing implied rights and remedies, and (ii) the federal courts should be reluctant to speak where Congress has been silent. *Sandoval*, 532 U.S. at 287-91, 121 S. Ct. at 1520-22 . The Petitioner, however, sees the central focus of *Sandoval* as being the effect of authoritative interpretative regulations. Pet. Br. 11. This is incorrect, because, as this Court held in *Sandoval*, such regulations may interpret a statute, but cannot create rights that Congress did not create. As this Court stated in *Sandoval*, "we have found no evidence anywhere in the text [of § 602] to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522.

The Eleventh Circuit's application of *Sandoval* is proper adherence to this Court's precedent. Furthermore, its resulting analysis and holding that no private cause of action for retaliation exists under Title IX or any promulgated regulations, is correct in light of this precedent and should not be disturbed.

CONCLUSION

As evident from the discussion above, as well as the decision below, the Eleventh Circuit correctly held that Title IX contains no implied private right of action for retaliation. The statute itself contains no express private remedy of any kind anywhere in its text, and absent evidence of Congressional intent to create such a remedy, this Court should not constrain to create the same. Consequently, the law in this matter is clear: inasmuch as Title IX contains no reference to retaliation, any implied private remedy for retaliation is, therefore, precluded. This Court advanced the same clarity in its decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), wherein it held that Congressional intent is the key to implied private rights and remedies, and that this intent could only be ascertained from the text and structure of the statute. The Eleventh Circuit merely adhered to this Court's reasoning from *Sandoval* in denying the Petitioner's Title IX claims against the Board on the grounds that Title IX simply did not permit the type of relief the Petitioner sought. Thus, regardless of what the administrative regulations, or the Petitioner, attempt to create, the Eleventh Circuit's decision was correct. The text and structure of Title IX clearly do not support an implied private right of action for retaliation, particularly not for alleged indirect victims like the Petitioner.

Respectfully submitted,

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APPENDIX A – STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 20 U.S.C. § 1682 are as follows:

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate

person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Pertinent provisions of 42 U.S.C. § 1981 are as follows:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Appendix A

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Pertinent provisions of 42 U.S.C. § 1983 are as follows:

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix A

Pertinent provisions of Title VII of the Civil Rights Act of 1964 are codified at 42 U.S.C. § 2000d, *et seq.* as follows:

42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pertinent provisions of 42 U.S.C. § 2000e are as follows:

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any

agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the Untied States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in *section 2102 of Title 5*), or (2) a bona fide private membership club (other than labor organization) which is exempt from taxation under *section 501(c) of Title 26*, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [*29 U.S.C.A. § 151* et seq.], or the Railway Labor Act, as amended [*45 U.S.C.A. § 151* et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within

the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization;

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employee by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof;

or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [*29 U.S.C.A. § 401* et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [*43 U.S.C.A. § 1331* et seq.]

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employers's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or

related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in *section 2000e-2(h)* of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employee from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to *section 2000e-16* of this title.

APPENDIX B – REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the federal regulations effectuating Title VI of the Civil Rights Act of 1964 are published at 28 C.F.R. part 42 as follows:

§ 42.104 Discrimination prohibited.

(a) General. No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this subpart applies.

(b) Specific discriminatory actions prohibited.

(1) A recipient to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;

(ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program; or

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.

(4) For the purposes of this section the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance

shall be deemed to include all portions of the recipient's program or activity, including facilities, equipment, or property provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and in paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) .Employment practices.

(1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment, a recipient of such assistance may not (directly or through

contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities). That prohibition also applies to programs as to which a primary objective of the Federal financial assistance is (i) to assist individuals, through employment, to meet expenses incident to the commencement or continuation of their education or training, or (ii) to provide work experience which contributes to the education or training of the individuals involved. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(2) In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (c)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, or national origin in such employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving

Federal financial assistance. In any such case, the provisions of paragraph (c)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

Pertinent provisions of the federal regulations effectuating Title VI of the Civil Rights Act of 1964 are published at 34 C.F.R. part 100 as follows:

§ 100.6 Compliance information.

(a) Cooperation and assistance. The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) Compliance reports. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary

recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) Access to sources of information. Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) Information to beneficiaries and participants. Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

Appendix B

Pertinent provisions of the federal regulations effectuating Title IX of the Education Amendments of 1972 are published at 34 C.F.R. part 106 as follows:

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6-100.11 and 34 CFR, Part 101.

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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

Although respondent wishes it were otherwise, this Court held long ago, and has repeatedly reaffirmed, that there is a private right of action to enforce Title IX's ban on sex discrimination. *See Cannon v. University of Chicago*, 441 U.S. 677, 688-89 (1979); *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). That case law establishes that petitioner may sue respondent for discrimination prohibited by Title IX. This case therefore presents only one, straightforward question: Does Title IX's statutory prohibition on sex discrimination encompass a prohibition on retaliation?

Petitioner demonstrated in his opening brief that the answer to that question, based on established principles of statutory construction, is yes. The text, background, and purposes of Title IX all indicate that it prohibits retaliation. That conclusion is confirmed by the statute's implementing regulations, which are entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The prohibition on retaliation is a core component of Title IX's broad ban on discrimination, and there is no reason why Congress would have permitted retaliation against those who invoke Title IX's protections.

TITLE IX PROVIDES REDRESS FOR RETALIATION

A. Ordinary Principles Of Statutory Construction Apply

Ordinary principles of statutory construction point conclusively to a result that respondent wants to avoid. So rather than argue the case under those principles, respondent (Br. 14-15, 36) and its amici States (Br. 3-5) take a different approach. They argue that ordinary rules of statutory interpretation do not apply to this case. It is not enough, they contend, for petitioner to show that retaliation is "discrimination" prohibited by Title IX, and then to rely on the established right of action to redress prohibited discrimination. Instead, they argue that, because this is a private action, peti-

tioner must also show that Congress specifically intended to create a right of action for discrimination that takes the form of retaliation, as distinct from discrimination generally.

But this Court held in *Cannon* that the rights-creating language of Section 901 of Title IX, 20 U.S.C. § 1681, establishes that Congress intended to provide a cause of action for all individuals who are subjected to discrimination prohibited by that section. *See* 441 U.S. at 690-94 & n.13. If retaliation against someone for complaining about sex discrimination falls within that textual prohibition, then the Court has *already* determined that Congress intended to provide a right of action to redress it. Thus, the critical question is whether retaliation is "discrimination" "on the basis of sex" within the meaning of Section 901 of Title IX. And that is an ordinary question of statutory interpretation, resolved by ordinary principles of statutory construction.

This Court has always applied ordinary rules in construing statutory language in cases in which the plaintiff sues under an implied right of action. In *Sandoval*, the very case on which respondent and its amici principally rely, the Court made clear that the scope of a statutory prohibition giving rise to a right of action is determined by looking to the statute itself and to regulations that "authoritatively construe the statute," just as in any other statutory interpretation case. 532 U.S. at 284. And, in two watershed Title IX cases brought by private plaintiffs under the *Cannon* cause of action, the Court used ordinary principles of statutory construction to conclude that the "discrimination" prohibited by Title IX includes sexual harassment of students by teachers, *Franklin v. Gwinnett County Public Schools* 503 U.S. 60 (1992), and students by other students, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

In neither case did the Court follow respondent's novel suggestion and require the plaintiffs to show that Congress specifically intended to provide a right of action for sexual

harassment. *See, e.g., Franklin*, 503 U.S. at 65 (noting that *Cannon* "held that Title IX is enforceable through an implied right of action" and "[w]e have no occasion here to reconsider that decision"). Indeed, the plaintiffs could not have made such a showing. No court held that sex discrimination includes sexual harassment until well after Title IX's enactment. *See Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978). Respondent's approach eviscerates *Cannon*, ignores *Sandoval*, and would require the Court to overrule *Franklin* and *Davis*.

Respondent's approach also makes no practical sense. It would result in a crazy quilt of statutory interpretation under which the same statutory term would mean one thing in cases involving administrative enforcement and another in private actions. Title IX contains only one prohibition of "discrimination." The term "discrimination" either includes retaliation or it does not. It cannot be that retaliation is "discrimination" in a challenge to an administrative action cutting off federal funds, but not in a private action. The Court should reject respondent's insupportable approach and apply ordinary principles of statutory construction, as it always has in interpreting Title IX.

B. Title IX's Ban On "Discrimination" "On The Basis Of Sex" Encompasses A Prohibition On Retaliation

1. When construed using established principles of statutory interpretation, Title IX's broad prohibition on sex-based "discrimination," 20 U.S.C. § 1681(a), clearly includes a ban on retaliation. Retaliation is simply one form of discrimination–conduct that treats certain people differently and less favorably than others. *See* Pet'r Br. 12-13.

Respondent's main argument in response is that retaliation cannot be prohibited discrimination because Title IX does not mention retaliation by name. But Congress used broad, general language to ensure that *all* forms of discrimi-

nation in educational programs would be prohibited by Title IX. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). Thus, Title IX prohibits employment discrimination, sexual harassment of students by teachers, and peer-on-peer harassment, even though it identifies none of those forms of discrimination by name. *Id.*; *Franklin*, 503 U.S. 60; *Davis*, 526 U.S. 629.[1]

The States (Br. 7-10) take a different tack, arguing that retaliation cannot be a form of discrimination because discrimination is a comparative harm and retaliation is not. But a retaliation claim is comparative in precisely the same way as any other discrimination claim. A victim of retaliation–someone who suffers an injury because he or she complained about discrimination–has been harmed as compared to individuals who did not complain and suffered no injury.[2]

This Court and the courts of appeals have therefore uniformly construed broad statutory prohibitions on discrimination to encompass bans on retaliation. The courts have taken that approach in construing 42 U.S.C. §§ 1981 and 1982, Section 504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, and the federal employee provisions of Title VII of the Civil Rights Act and the Age Discrimination in Employment Act (ADEA). *See* Pet'r Br. 13-16. Because

[1] As respondent itself notes (Br. 10), Title IX does not mention sports, but even respondent does not argue that discrimination in sports is therefore outside the statute's ambit. Likewise respondent observes (*id.*) that Title IX does not expressly extend its protection to both men and women, but there can be no question that Title IX protects both sexes, *cf. Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

[2] Even if the States were correct in their cramped interpretation of "discrimination," Title IX also prohibits excluding individuals "from participation in" or denying them "the benefits of" an educational program or activity. 20 U.S.C. § 1681. Petitioner's removal from his coaching position would thus still be prohibited by Title IX, because he was excluded from participation in, and denied the benefits of, the high school girls' athletics program.

none of those statutes expressly prohibits retaliation, none of them would protect against retaliation if respondent and its amici were correct.

2. The principle that a prohibition on discrimination encompasses a ban on retaliation has its roots in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Respondent (Br. 15-16) tries to undercut that principle by attacking the continued validity of *Sullivan*, but none of respondent's attacks passes muster.

Respondent incorrectly argues that *Sullivan* has been superseded by this Court's recent private right of action cases. That argument confuses *Sullivan*'s remedial holding–that there is a private right of action under 42 U.S.C. § 1982–with its substantive holding–that § 1982 prohibits retaliation against those who complain about interference with the property rights of minorities. The principle that a ban on discrimination includes a ban on retaliation rests on *Sullivan*'s substantive holding, not its remedial holding. The Court's recent cases about private rights of action do not in any way call into question that substantive holding.[3]

Respondent also erroneously suggests that *Sullivan* was undermined by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Not only has *Patterson* been abrogated by congressional legislation, but it involved 42 U.S.C. § 1981, not § 1982, which was the focus of this Court's decision in *Sullivan*. Moreover, *Patterson* addressed only whether § 1981, which prohibits discrimination in making and enforcing contracts, covers conduct after contract formation. *Patterson*

[3] Nor do they call into question *Sullivan*'s remedial holding that § 1982 provides a private right of action. That holding is fully consistent with the Court's recent jurisprudence because § 1982 uses the rights-creating language that signals congressional intent to authorize private actions. *See Sandoval*, 532 U.S. at 288-89; 42 U.S.C. § 1982 ("All citizens of the United States shall have the same right . . . .").

casts no doubt on the principle that a ban on discrimination includes a ban on retaliation. *See* Pet'r Br. 15 n.3.

Recognizing that *Sullivan* is fatal to its position, respondent is ultimately forced to ask this Court to overrule the case. *See* Br. 16. But respondent offers no reason for the Court to take that dramatic action, for the simple reason that there is none. *Sullivan* is fully consistent with the approach to anti-discrimination statutes followed by the federal courts with success for nearly forty years.

3. Respondent also argues that retaliation is not covered by Title IX because it is not imposed "on the basis of sex" but rather on the basis of speech. Resp't Br. 7, 11, 17-18, 37.[4] But the fact that retaliation is based on speech does not mean that it is not also based on sex. When a recipient of federal funds retaliates against someone because that person complained about sex discrimination, the retaliation is based on both speech and sex. As petitioner explained in his opening brief (at 17), the retaliation against him was based on sex in two ways–it was triggered by his complaint of sex discrimination, and differential treatment based on sex gave rise to that complaint.

Indeed, respondent concedes that retaliation is discrimination based on *someone*'s sex. *See* Br. 7 (stating that petitioner "has alleged discrimination on the basis of someone else's sex"); *id.* at 18 ("the basis of his retaliation claim is the discriminatory treatment of others based on *their* sex"). Respondent nonetheless argues that, to fall within Title IX, discrimination must be based on the sex of the victim. But Title IX does not contain such a limitation. Unlike some other

[4] To support that argument, respondent relies on the district court opinion in *Litman v. George Mason University*, which was reversed by the Fourth Circuit. *See* 92 Fed. Appx. 41, 2004 WL 345758 (4th Cir. Feb. 25, 2004). Although respondent's October 26, 2004, letter to the Clerk's Office describes the reversal as "partial," the Fourth Circuit reversed the district court's ruling on the retaliation claim in its entirety.

civil rights statutes (which contain separate anti-retaliation provisions), Title IX does not state that no person shall be subject to discrimination "on the basis of *such individual's* sex." *Cf.* 42 U.S.C. § 2000e-2 (Title VII); 29 U.S.C. § 623(a) (ADEA). Title IX omits that limiting phrase. Retaliation for complaining about sex discrimination fits comfortably within Title IX's *actual* prohibition on discrimination "on the basis of sex." 20 U.S.C. § 1681.

4. Respondent and its amici try to bolster their textual argument by drawing a negative inference from the fact that Title VII contains an express anti-retaliation provision while Title IX does not. *See* Resp't Br. 7-8, 18-21, 38; States' Br. 10-13. But, as respondent admits, "Title VII and Title IX are very different." Br. 19. Those differences preclude drawing any conclusion from the lack of anti-retaliation language in Title IX. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002) (presumption "that the presence of a phrase in one provision and its absence in another reveals Congress' design . . . grows weaker with each difference in the formulation of the provisions").

Title IX contains a broadly-worded, general ban on discrimination, while Title VII spells out in detail the specific forms of conduct that violate the statute. *See* Pet'r Br. 34-35. Because Congress did not mention any specific discriminatory practices in Title IX, the failure to mention retaliation in particular does not in any way imply that it is permissible. In addition, Title VII contains the limiting phrase "such individual's," but Title IX does not. *See* pp. 6-7, *supra*. The presence of that phrase in Title VII raises ambiguity about whether its language encompasses a broad ban on retaliation, and Congress may have included an express anti-retaliation provision to dispel that ambiguity. *See* U.S. Br. 20-21.[5]

[5] For those reasons, the States are incorrect in contending (Br. 11) that the anti-retaliation provision in Title VII is surplusage under petitioner's reading of Title IX.

The additional differences between Title VII and Title IX identified by respondent (Br. 19) also counsel against drawing a negative inference from the absence of a specific discussion of retaliation in Title IX. For example, respondent notes that the private right of action under Title VII is express, while the right of action under Title IX is implied. The implied nature of the cause of action under Title IX means, however, that Title VII's express protection against retaliation affirmatively supports interpreting Title IX to provide comparable protection. As respondent notes, related express causes of action shed light on the scope of an implied cause of action. *See* Br. 22; *see also* Leadership Conf. Br. 23-24. Not only Title VII but every major anti-discrimination statute with an express cause of action includes protection against retaliation. *See id.* at 22-23. That provides powerful support for the conclusion that Title IX also includes such protection. *See Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 178-79 (1994).

5. Respondent and its amici also argue that construing Title IX to prohibit retaliation is inconsistent with its status as Spending Clause legislation. *See* Resp't Br. 9, 21, 24-28; States' Br. 5-6. As an initial matter, Title IX is not based solely on the Spending Clause but also implements the Fourteenth Amendment. Moreover, respondent is incorrect that, under *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), a Spending Clause statute may be construed to prohibit conduct only if the conduct is mentioned specifically in the statute. To support that argument, respondent relies heavily on the *dissent* in *Davis*, a reliance that is telling. The opinion of the *Court* in *Davis*, which is controlling, makes clear that *Pennhurst* imposes no such requirement. *Davis*, 526 U.S. at 650; *see also Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985). If that were not the case, the Court's decisions in *North Haven*, *Franklin*, and *Davis*–involving employment discrimination, sexual harassment of a student by a teacher, and harassment of a student by her

peer student–would *all* be wrong. None of the conduct that those cases held to be prohibited by Title IX is mentioned expressly in the statute.

Davis and *Franklin* also establish that the Spending Clause and *Pennhurst*'s notice requirement pose no obstacle to liability (including liability for damages) for conduct that Title IX clearly prohibits, such as intentional discrimination. *Davis*, 526 U.S. at 642; *Franklin*, 503 U.S. at 74-75. As discussed above, retaliation is intentional discrimination, clearly prohibited by Title IX. *Sullivan*, and the court of appeals cases applying its reasoning across the spectrum of civil rights statutes, long ago removed any doubt that Title IX's broad prohibition on discrimination encompasses a prohibition on retaliation.

Title IX itself thus provided ample notice that respondent could not retaliate against petitioner. If further notice was needed, however, it was provided by Title IX's implementing regulations. *See Davis*, 526 U.S. at 643 (relying on regulations for requisite notice). Those regulations have always provided that retaliation is prohibited, as respondent itself concedes. *See* Br. 30 (stating that retaliation "would violate . . . the regulation"). Given the longstanding regulations, there can be no question that respondent had adequate notice that it could not retaliate against petitioner.

Moreover, as respondent's amici note, retaliation for complaining about sex discrimination is also prohibited by other statutory and constitutional provisions. *See* Nat'l Sch. Bds. Ass'n (NSBA) Br. 11-18. Respondent cannot and does not argue that it has any legitimate interest in retaliating against petitioner, and the NSBA agrees (*id.* at 10). Under those circumstances, the idea that respondent could have believed that it was free to retaliate rings hollow. *See Davis*, 526 U.S. at 644 (relying on common law of torts as providing requisite notice).

C. The Context Surrounding Title IX's Enactment Confirms That It Prohibits Retaliation

Petitioner also established in his opening brief that (1) Congress was aware that retaliation was a problem when it enacted Title IX; (2) Congress enacted Title IX against the backdrop of *Sullivan,* which made clear that Title IX's broad ban on discrimination would prohibit retaliation; and (3) Congress modeled Title IX on Title VI, which had been construed to prohibit retaliation. *See* Pet'r Br. 19-22. Only the States make any attempt to wrestle with those important points, and none of their arguments withstands scrutiny.

1. The States (Br. 15) first argue that no weight should be accorded the congressional hearing testimony describing retaliation against those who complained about sex discrimination. A witness's statement at a hearing about a statute's meaning is, of course, far less significant than a comparable statement in a Committee report. But petitioner is not relying on hearing witnesses' constructions of Title IX. Petitioner is relying on the hearing testimony only to show that Congress was aware of the retaliation problem. That is a perfectly legitimate use of the testimony, because the very reason that Congress holds hearings is to gather information about the issues on which it is legislating. *See Tennessee v. Lane*, 124 S. Ct. 1978, 1990-92 (2004) (relying on hearing testimony to demonstrate Congress's awareness of problems addressed by Americans with Disabilities Act); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730-32 (2003) (same for Family and Medical Leave Act).

2. The States (Br. 16-18) also argue that it was unclear when Congress enacted Title IX that *Sullivan* established that a broad ban on discrimination includes a ban on retaliation. But *Sullivan* clearly held that § 1982–which prohibits discrimination in property transactions but does not contain an anti-retaliation provision–prohibited retaliation against Sullivan for advocating the rights of Freeman, his black lessee. The Court held that "Sullivan's expulsion for the advocacy of Freeman's cause" could not "be imposed" because, if it could, "Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982," and "[s]uch a sanction would give impetus to the perpetuation of racial restrictions on property." 396 U.S. at 237.

The Court went on to state that third parties are sometimes the only effective advocates of rights under the statute and that there was no question that Sullivan had "standing." *See* 396 U.S. at 237. The States argue that this statement shows that the case was only about Sullivan's standing. But, even if the statement was an additional holding concerning standing (rather than a use of the term "standing" to refer to a cause of action), it does not detract from the Court's primary holding. *Sullivan* unquestionably held that an individual could sue under § 1982 based on retaliation suffered for advocating the rights of others, even though § 1982 does not expressly prohibit retaliation. That clear holding would have led Congress to believe that the general prohibition on discrimination in Title IX would provide redress for retaliation.[6]

3. The States do not dispute that, before Title IX was enacted, Title VI had been interpreted by regulation to prohibit retaliation. Nonetheless, they disparage the proposition that Title IX should be construed in light of that interpretation as "rest[ing] entirely on inferences from Congress's silence."

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[6] Respondent argues that *Sullivan* can have no relevance to Title IX because *Sullivan* was decided after the enactment of Title VI, on which Title IX was modeled. But this Court has already concluded that *Sullivan* does inform construction of Title IX. *See Cannon*, 441 U.S. at 699 (reasoning that Congress was "thoroughly familiar with" the "unusually important [recent decision in *Sullivan*] . . . and that it expected its enactment to be interpreted in conformity with [it]"). Moreover, Title VI, which has always been interpreted by regulation to prohibit retaliation, itself embodies the *Sullivan* principle that a broad ban on discrimination includes a ban on retaliation.

Br. 19. But that proposition is *not* based on an inference from silence. It is based on affirmative statements by Title IX's sponsor, Senator Bayh, that Title IX was to be enforced as Title VI had been. *See Cannon*, 441 U.S. at 696 & n.19. The States elsewhere acknowledge that the Senator's statements are "authoritative indications of congressional intent" regarding Title IX's scope. Br. 14 (quoting *North Haven*, 456 U.S. at 527).[7]

D. Title IX's Purposes Would Be Frustrated If Retaliation Were Not Actionable

1. The conclusion that Title IX prohibits retaliation is supported not only by its text and the context in which it was enacted but also by its purposes–eliminating sex discrimination from federally-funded educational programs and protecting program participants from discrimination. As discussed in petitioner's opening brief (at 22-26), Title IX could not have achieved those purposes without prohibiting retaliation, and Congress had no reason to permit funding recipients to retaliate. Respondent's only answer to those points is the assertion that "direct victims of sex discrimination would still have a mechanism for pursuing their rights" if there were no prohibition on retaliation. Br. 12. But, as petitioner has explained, victims will be afraid to complain about discrimination if they are not protected from retaliation. *See* Br. 22-23 ("redress [for an initial act of discrimination] would be of little value because the same discriminatory treatment (or worse) could be imposed as reprisal for the initial complaint"). For precisely that reason, retaliation is a serious obstacle to elimination of sex discrimination in education. *See* Nat'l P'ship for Women & Families Br. 3-18.[8]

[7] Senator Bayh has filed an amicus brief in this case stating that Congress intended Title IX to prohibit retaliation.

[8] The absence of protection against retaliation would be particularly problematic in the sexual harassment context, because a federal funding recipient's actual notice and failure to take corrective action are prerequisites to monetary relief for sexual harassment victims. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998). Those prerequisites apply only to sexual harassment claims, based on this Court's view that they present a unique danger that a recipient will be held liable for conduct in which it did not itself engage, that it did not know about, and that it had no opportunity to prevent. *See Davis*, 526 U.S. at 640-41. Those requirements do not apply to retaliation, which is an intentional and official act that can be carried out only by someone acting with authority. Nor do they apply in other contexts in which a recipient may be found to have violated Title IX. But the Court need not address the applicability of the requirements here, since respondent has not–and could not have–claimed that it lacked notice of petitioner's complaints.

Indeed, respondent's amicus NSBA concedes that "retaliation against individuals for asserting Title IX rights would diminish the effectiveness of the statute in achieving its goal of gender equality." Br. 4; *see also id.* at 10 (agreeing that "educational institutions should not be able to retaliate against individuals for complaining about perceived gender discrimination against others").

The States do not contend otherwise. They argue instead that federal agencies could prohibit retaliation by regulation even if the Court held that Title IX does not prohibit it. *See* Br. 26-28. Petitioner shares that view, but the issue has not been resolved by this Court. *Cf. Sandoval*, 532 U.S. at 282, 286 n.6 (reserving the question whether Title VI regulations prohibiting disparate impact discrimination are valid notwithstanding the Court's holding that Title VI itself prohibits only intentional discrimination).

Moreover, the fact that the agencies might retain authority to prohibit retaliation if there were no statutory prohibition would not have enabled Congress to omit a statutory prohibition and still be certain that Title IX could achieve its purposes. Even if the agencies *could* prohibit retaliation, Congress could not have known, when it enacted Title IX, whether the agencies *would* do so. And, even if the agencies

did adopt regulations prohibiting retaliation, Congress would have had no guarantee that the agencies would not repeal the regulations at some future time.

In any event, as this Court held in *Cannon*, administrative enforcement is not sufficient to achieve Title IX's goal of protecting private individuals from discrimination. *See* 441 U.S. at 704-06; Am. Bar Ass'n (ABA) Br. 14-17. The administrative remedy–cutting off a recipient's funds–is draconian and has never been used in the history of Title IX. *See* ABA Br. 14 n.17. The deterrent effect provided by liability for money damages is therefore essential. But administrative enforcement agreements need not provide any individual relief, and discrimination victims have no entitlement to participate in investigative or enforcement proceedings. *See id.* at 14-15. Finally, given its high workload, the Department of Education's Office of Civil Rights tends to focus on systemic problems rather than individual instances of discrimination. *See* Leadership Conf. Br. 12 n.5; *Cannon*, 441 U.S. at 708 n.42.

2. Respondent argues that construing Title IX to prohibit retaliation would lead to "boundless liability." Br. 9. But a funding recipient is liable for retaliation under Title IX *only* if an individual complains about sex discrimination and the recipient retaliates against the individual because of that complaint. Liability turns on application of a well-established standard that has been applied to many civil rights statutes. *See* Pet'r Br. 25 n.6. There is no basis for respondent's dire predictions.

Nor would allowing retaliation suits render school boards reluctant to make employment decisions for fear of liability, as respondent and its amici contend. Resp't Br. 45; NSBA Br. 26-30. School boards, as state actors, are already liable for retaliation under 42 U.S.C. § 1983 based on the First Amendment, and they may also be liable under other statutory provisions. *See* NSBA Br. 10-18. Moreover, *North*

Haven established that Title IX prohibits employment discrimination. Thus, it is difficult to see how recognizing that Title IX also provides redress for retaliation will meaningfully increase litigation against or liability of school boards. Fear of unbounded liability is especially unwarranted given the modest number of Title IX retaliation cases that have been brought to date. *See* Pet'r Br. 26; N.Y. Lawyers for the Pub. Interest Br. 18-20.

E. The Regulations Reflect A Valid Interpretation Of Title IX And Are Entitled To *Chevron* Deference

Respondent (Br. 30) concedes that "the retaliatory conduct of which the Petitioner complains would violate . . . the regulation[s]" implementing Title IX, but it argues that the regulations are not a permissible interpretation of Title IX. As petitioner explained in his opening brief (at 26-31), however, the regulations reflect a reasonable–indeed, the correct–interpretation of Title IX; they were promulgated after notice and comment under an express grant of rulemaking authority; and they are therefore entitled to *Chevron* deference. Moreover, they were submitted to Congress for review, and Congress allowed them to take effect, thereby indicating that they correctly interpret Title IX.

Respondent's primary challenge to the regulations is that they are an unreasonable interpretation of Title IX because the statute clearly fails to prohibit retaliation. Br. 28-31. Respondent, however, has it exactly backwards. For all the reasons stated above and in petitioner's opening brief, it is clear that Title IX does prohibit retaliation.

Respondent (Br. 42) and the States (Br. 20-24) also argue that the regulations do not interpret Title IX but are only procedural provisions governing the administrative process. But the fact that the regulations, in large part, address the administrative process does not mean that they do not also reflect the federal agencies' view that retaliation is a form of discrimination prohibited by Title IX. The regulations do dou-

ble duty–they govern the administrative process *and* they show that the agencies interpret Title IX to prohibit retaliation. *See* U.S. Br. 17.

Both the title of the regulation addressing retaliation ("Intimidatory and retaliatory acts prohibited") and its text indicate that it is a substantive prohibition. The text also makes clear that the prohibition is not limited to the administrative process. Although the second half of the regulation prohibits retaliation for participation in the administrative process, the first half addresses retaliation more generally, stating that retaliation "for the purpose of interfering with any right or privilege secured by [20 U.S.C. § 1681]" is prohibited. 34 C.F.R. § 100.7(e) (as incorporated by 34 C.F.R. § 106.71). The regulatory language also makes clear that the agencies view retaliation and discrimination as part and parcel of the same prohibited conduct. Following a title indicating that the regulation addresses "retaliatory acts," the regulation describes such acts as "discriminat[ion.]" *Id.* ("No recipient or other person shall intimidate, threaten, coerce, or *discriminate* against any person." (emphasis added)).

The Solicitor General has told the Court that the relevant federal agencies read the regulations as reflecting the interpretation that Title IX prohibits retaliation, and agency guidance confirms that representation. *See* U.S. Br. 17; 62 Fed. Reg. 12,044 (1977); United States Dep't of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001). The agencies' interpretation of their own regulations is "controlling" because it is neither "plainly erroneous" nor "inconsistent with the regulation[s]." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). Indeed, respondent concedes that it is at least "debatable" that the regulations "speak[] to retaliation and discrimination." Br. 43. That concession resolves the issue.

In any event, the Court need not address the regulations to decide this case. Title IX would prohibit retaliation even if the regulations did not exist, because that is the best reading of the statute, given its text, considered in light of established anti-discrimination case law, the backdrop against which Title IX was enacted, and the statute's purposes.

F. *Sandoval* Does Not Control This Case

Respondent (Br. 39-41) tries to sidestep that conclusion by asserting that this case is controlled by *Sandoval*. As petitioner described in his opening brief (at 32-34), *Sandoval* held that there is no implied right of action for conduct that a statute permits, even if such a right might be inferred from agency regulations. That holding is inapposite here because petitioner does not rely on federal regulations that have extended Title IX's protection beyond the protection provided by the statute. Instead, he invokes only the core protection of Title IX itself and relies on the right of action to enforce that protection that this Court recognized more than 25 years ago in *Cannon*. Thus, respondent's argument (Br. 41-43) that the Title IX regulations do not themselves create a right of action is beside the point. Whether or not they create such a right, petitioner does not invoke that right here.[9]

The regulations are relevant only because they "authoritatively construe [Title IX] itself." *Sandoval*, 532 U.S. at 284. Thus, although the regulations may not give rise to an independent cause of action, they "are covered by the cause of action to enforce" the statute that they interpret. *Id.* And that is the cause of action that petitioner has invoked.

G. All Victims Of Retaliation Are Covered By Title IX

Respondent and its amici also defend the judgment below on the ground that, even if Title IX provides redress for

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[9] As respondent notes (Br. 45-49), a few district courts and a dissenting judge in the Fourth Circuit have interpreted *Sandoval* the way that the Eleventh Circuit did here. But no other court of appeals has done so, the Fourth Circuit has expressly rejected that interpretation, and other courts of appeals have uniformly held or assumed that Title IX provides redress for retaliation. *See* Pet'r Br. 16 n.5 (citing cases).

retaliation, it does not provide relief for so-called "indirect" victims. Once one acknowledges that Title IX protects against retaliation, however, there is no basis–textual or otherwise–for limiting the statute's protection to those who complain about sex discrimination against themselves rather than others. *See* Pet'r Br. 36-41. Because retaliation is itself discrimination, all victims of retaliation are "direct" victims of discrimination. Moreover, if there were a distinction between "direct" and "indirect" victims, this case illustrates that it would not be as easy to draw as respondent suggests. Petitioner was personally harmed by the discrimination against the team he coached. *See id.* at 36, 41-43.

In attacking application of Title IX to "indirect" victims, respondent unsuccessfully rehashes several arguments that it invoked in its effort to show that Title IX does not protect against retaliation at all. For example, respondent argues that protection for those who protest discrimination against others cannot be squared with Title IX's "on the basis of sex" language. *See* Br. 33-36 (permitting indirect victims to bring retaliation claims would transmute "on the basis of sex" into "on the basis of anything"). Here again, respondent's argument depends on importing absent language into the statute. There might be some basis for limiting the retaliation protection to those who protest discrimination directed against themselves if Title IX provided that no person shall be subject to discrimination "on the basis of *such individual's* sex." But Congress did not include that limiting language. *See* Pet'r Br. 37; pp. 6-7, *supra*.

Respondent (Br. 27) also revisits its flawed Spending Clause argument. But that argument fails here for the same reason it fails more generally: retaliation (whether directed against those who complain about discrimination against themselves or those who complain about discrimination against others) is a form of intentional discrimination. Respondent therefore had ample notice that Title IX prohibits it. *See* pp. 8-9, *supra*. Moreover, nothing in the statutory

language, regulations, or precedent distinguishes between those who complain about personal discrimination and those who complain about discrimination against others. Thus, because respondent had ample notice that retaliation is generally prohibited, it had ample notice that retaliation against those who advocate for the Title IX rights of others is prohibited.

Respondent rouses the specter of unlimited liability for claims brought by "indirect" victims of retaliation. *See* Br. 36 (arguing that "every employee could file a lawsuit based on their observations rather than their personal injury or harm" and Title IX would "embrace any employee who ever complained about someone else's troubles, whether real or imagined"). That fear is groundless. Individuals cannot file Title IX retaliation claims "based on their observations." They can only do so if they are victims of retaliation–in which case they have suffered "personal injury or harm." Coverage for retaliation does not mean that Title IX provides relief for "any" employee who complains "about someone else's troubles, real or imagined." It means only that a person can seek relief if he or she suffers retaliation after complaining "in good faith and with a reasonable and sincere belief that he or she is opposing unlawful discrimination" under Title IX. Pet'r Br. 26 n.6 (quoting *Talanda v. KFC Nat'l Mgmt. Co.*, 140 F.3d 1090, 1096 (7th Cir. 1998)).

Moreover, protecting all victims, including those not directly affected by initial discrimination, would not impermissibly expand the class of Title IX beneficiaries, as the States contend (Br. 28-30). Title IX's beneficiaries include all those subjected to "discrimination" "on the basis of sex." 20 U.S.C. § 1681. That language embraces all those who suffer retaliation for complaining about sex discrimination, whether against themselves or against others. The same is true of the regulations, which, contrary to respondent's contentions (Br. 35), provide no basis for restricting retaliation protection to "direct" victims. *See* Pet'r Br. 37-38.

Finally, contrary to the NSBA's contention (Br. 4-18), retaliation protection for those who protest discrimination against others is critical to Title IX's effectiveness. If they fear retaliation, those who witness discrimination will not bring the problem to the attention of authorities who can correct it. And it is not sufficient to rely for enforcement of Title IX on only those who suffer discrimination directed against themselves. The victims of Title IX discrimination are often students and minors, who may be poorly situated to recognize discrimination or to complain about it. *See* Pet'r Br. 40-41; ABA Br. 17-19; Nat'l Educ. Ass'n Br. 4-12, 15-16; Women's Sports Found. Br. 20-22, 23-24. Girls like those on petitioner's team need advocates like him to stand up for their right to equal treatment. If teachers and coaches like petitioner are prevented from complaining about Title IX violations, one of the most effective means of enforcing the statute will be lost.

CONCLUSION

For the reasons stated above and in petitioner's opening brief, the judgment of the court of appeals should be reversed.

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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rules 25.5 and 25.6, Respondent Birmingham Board of Education respectfully moves this Court for permission to file the accompanying supplemental brief, which contains statistics concerning administrative enforcement by the Department of Education's Office of Civil Rights ("OCR"). During the oral argument of this matter, the Court had questions about the number of complaints filed, resolved, etc., by OCR. None of the lawyers, unfortunately, had precise data at hand. For the Court's convenience, the accompanying brief provides that data from the OCR's *Annual Report to Congress, FY 2001-2002*, which is accessible at: http://www.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html, and is subject to judicial notice.

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RESPONDENT'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rules 25.5 and 25.6 and the accompanying motion for leave to file, Respondent Birmingham Board of Education respectfully submits this supplemental brief, which contains statistics concerning administrative enforcement by the Department of Education's Office of Civil Rights ("OCR"). During the oral argument of this matter, the Court had questions about the specific number of complaints filed, resolved, etc., by OCR. None of the lawyers, unfortunately, had precise data at hand. For the Court's convenience, this brief provides that data from the OCR's *Annual Report to Congress, FY 2001-2002* (hereinafter *Annual Report*), which is accessible at: http://www.ed.gov/about/offices/list/ocr/AnnRpt2002/index.html, and is subject to judicial notice.

1. The *Annual Report* shows that during the last fourteen years, OCR has received and resolved the following number of complaints. (Please note: (1) The data include all complaints processed by OCR – *i.e.*, not only those alleging sex discrimination under Title IX, but also disability discrimination under the ADA and the Rehabilitation Act, race discrimination under Title VI, and age discrimination under the Age Discrimination Act.[1] (2) The numbers for complaints "resolved" include cases carried over from previous years.)

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1. Appendix A of the *Annual Report* shows that, during fiscal years 2001 and 2002, sex discrimination complaints accounted for 6.8% and 7.0% of all OCR complaints, respectively. The comparable numbers for disability and race discrimination claims are 53.9% (2001) and 53.8% (2002), and 18.6% (2001) and 17.6% (2002), respectively.

FY	Filed	Resolved
2002	5019	4842
2001	4571	4777
2000	4897	6364
1999	6628[2]	5369
1998	4847	4753
1997	5296	4981
1996	4828	4886
1995	4981	5559
1994	5302	5751
1993	5090	4484
1992	4432	4180
1991	3809	3497
1990	3384	3130
1989	2780	2557

2. Although the *Annual Report* does not detail the type of "resolution" in which each complaint culminated, the report does state that —

> OCR uses a variety of techniques to resolve complaints, ranging from facilitating voluntary resolutions between parties to negotiating agreements with recipients for voluntary compliance. If these methods fail, OCR issues violation letters and enters into negotiations to correct those violations. It is only after OCR has advised recipients of their failure to comply with the civil rights laws and has determined that compliance cannot be secured by voluntary means that, as a last resort, OCR seeks compliance through the administrative hearing process or refers cases to the U.S. Department of Justice.

2. The *Annual Report* reflects that in 1999, 1614 complaints were "filed by a single complainant."

The *Annual Report* thus refers to OCR's enforcement strategy as entailing a "flexible approach."

In this respect, the *Annual Report* squares with this Court's acknowledgment that agencies enforcing Title IX may leverage individual equitable relief (including reinstatement) for victims, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288 (1998) (citing *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 518 (1982)), and with the statement in the U.S. Department of Justice's *Title IX Legal Manual* that —

> agencies are encouraged to identify and seek the full complement of relief for complainants and identified victims, where appropriate, as part of voluntary settlements, including, where appropriate, not only the obvious remedy of back pay for certain employment discrimination cases, but also compensatory damages for violations in a nonemployment context.

U.S. Department of Justice, *Title IX Legal Manual* 155 (2001), *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf.

3. The *Annual Report* also catalogues statistics concerning the timeliness with which OCR resolves complaints submitted to it. With respect to the last three years for which statistics were available, the report shows the following:

FY	% Complaints Resolved Within 180 Days
2000	78%
2001	84%
2002	89%

4. The *Annual Report* likewise shows that, "[i]n addition to resolving complaints, OCR initiates compliance reviews and takes other proactive steps to focus on specific compliance problems that are particularly acute or national in scope." Specifically, in FY 2001, OCR initiated 21 compliance reviews and brought 43 reviews to completion; in FY 2002, OCR initiated 11 compliance reviews and resolved 18.

5. The *Annual Report* further states that, in addition to resolving individual complaints and performing compliance reviews, "OCR conducted 2,234 monitoring activities in FY 2001 and 2,343 in FY 2002."

6. Finally, the *Annual Report* shows that, in addition to its various enforcement-related duties, in an effort "to end discrimination . . . before it starts," "OCR provides technical assistance [to recipients] through a variety of methods, including onsite consultations, conferences, training, community meetings and publishing and disseminating materials."

* * * * *

Respondent hopes that the foregoing information is responsive to the Court's questions at oral argument and will be of assistance to the Court in resolving this matter.

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RODERICK JACKSON, PETITIONER

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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In the Supreme Court of the United States

No. 02-1672

RODERICK JACKSON, PETITIONER

v.

BIRMINGHAM BOARD OF EDUCATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The United States Department of Education has authority to ensure that educational institutions that receive federal financial assistance comply with Title IX. 20 U.S.C. 1682. Pursuant to that authority, the Department has promulgated Title IX regulations, 34 C.F.R. Pt. 106, including a provision prohibiting retaliation. 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)). The Department of Justice coordinates the implementation and enforcement of Title IX by the Department of Education and other executive agencies. Exec. Order No. 12,250, 3 C.F.R. 298 (1981); 28 C.F.R. 0.51 (1998). The Department of Justice has issued a regulation that tracks the Department of Education's retaliation regulation. 65 Fed. Reg. 52,858-52,895

(2000). The Department of Justice also may enforce Title IX in federal court in cases referred to it by the Department of Education. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

Petitioner Roderick Jackson, a teacher, filed suit against respondent Birmingham Board of Education alleging that respondent retaliated against him because he had complained about sex discrimination in respondent's high school athletic program. Petitioner alleged that such retaliation violates Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The district court dismissed petitioner's complaint for failure to state a claim, holding that Title IX does not prohibit retaliation. The court of appeals agreed that Title IX does not prohibit retaliation and affirmed the district court's judgment of dismissal.

1. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Title IX is modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race in federally assisted programs. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-695 (1979).

Title IX authorizes federal agencies that provide federal financial assistance "to effectuate" Title IX "by issuing rules, regulations, or orders of general applicability," and to enforce such regulations administratively. 20 U.S.C. 1682. Pursuant to that directive, the Department of Education adopted a regulation address-

ing retaliation that was originally issued to enforce Title VI. See 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)). The regulation is entitled "[i]ntimidatory or retaliatory acts prohibited" and provides that:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. 100.7(e).

2. In 1993, respondent hired petitioner as a physical education teacher and coach for the girls' basketball team. Pet. App. 3a. Petitioner was transferred to Ensley High School where his duties included coaching the girls' basketball team. *Ibid.* During his coaching tenure, petitioner came to believe that respondent was not providing the girls' basketball team with equal funding or equal access to sports facilities and equipment. *Ibid.* After petitioner complained to his supervisors about the treatment of the girls' basketball team, he began to receive negative evaluations. *Ibid.* In May 2001, respondent relieved petitioner of his coaching duties. *Ibid.* Respondent still employs petitioner as a teacher, but petitioner no longer receives the supplemental pay he received for coaching. *Id.* at 3a, 29a & n.1.

Petitioner filed suit against respondent in federal district court, alleging that respondent retaliated against him, in violation of Title IX. Pet. App. 29a. The district court dismissed petitioner's complaint, holding that Title IX does not create a private cause of action for retaliation. *Id.* at 27a.

The court of appeals affirmed. Pet. App. 1a-26a. The court stated that it would be governed in its interpretation of Title IX by this Court's decision *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Applying its understanding of *Sandoval*, the court first held that, while the text of 20 U.S.C. 1681 protects individuals in federally assisted programs from discrimination on the basis of sex, it does not create a private right of action for retaliation. Pet. App. 19a-20a. The court reasoned that "[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations," and "[i]ndeed, the statute makes no mention of retaliation at all." *Id.* at 20a.

The court next held that 20 U.S.C. 1682 does not create a private cause of action for retaliation. Pet. App. 20a-21a. The court reasoned that Section 1682 is "devoid of 'rights-creating' language of any kind—whether against gender discrimination, retaliation, or any other kind of harm," and instead "directs and authorizes *federal agencies* to regulate recipients of federal funding." *Id.* at 21a.

The court of appeals acknowledged that a Department of Education regulation expressly protects individuals from retaliation, but it held that the regulation does not create a private cause of action for retaliation. Pet. App. 22a. Relying on *Sandoval*, 532 U.S. at 291, the court reasoned that an agency may not afford a private right of action through regulation when Congress has not done so in the statute itself. Pet. App. 22a.

Finally, the court held that even if Title IX prohibits retaliation, petitioner would not be within the class of persons protected by that prohibition. Pet. App. 23a-24a. In the court's view, the statute only protects "direct victims" of sex discrimination, and not persons who protest the discriminatory treatment of others. *Ibid.*

SUMMARY OF ARGUMENT

I. When a recipient of federal funds subjects a person to intentional "discrimination" "on the basis of sex," 20 U.S.C. 1681, the victim of discrimination may file a private action against the recipient under Title IX. A Title IX recipient that purposefully retaliates against a complainant because the complaint is about intentional sex discrimination, as opposed to some other matter, subjects the complainant to intentional "discrimination" "on the basis of sex." The victim of that retaliation may therefore seek judicial relief from the recipient.

The legal background against which Title IX was enacted confirms that Title IX contains protection against intentionally discriminatory retaliation. Just three years before Title IX was enacted, the Court held in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), that the general prohibition against discrimination in the sale or rental of property in 42 U.S.C. 1982 bars retaliation against a person who complains about discrimination.

Interpreting Title IX to incorporate protection against discriminatory retaliation also furthers Congress's purposes in enacting Title IX—to avoid the use of federal resources to support discriminatory practices, and to provide individuals effective protection against those practices. Those objectives would be difficult, if not impossible, to achieve, if persons who complain about sex discrimination lacked adequate protection against retaliation.

In addition, before Title IX was enacted, substantial evidence was presented to Congress that persons who

had complained about sex discrimination at educational institutions had suffered retaliation. There is no reason that Congress would have wanted to leave those opposing sex discrimination unprotected from such conduct.

A regulation issued by the Department of Education, the agency with primary responsibility for enforcing Title IX, reflects the agency's authoritative conclusion that retaliation against a person because that person has filed a sex discrimination complaint violates Title IX. A regulation issued by the Department of Justice, which has the authority to coordinate enforcement of Title IX, reflects the same interpretation. Those two regulations are entitled to deference and reinforce the conclusion that Title IX bars intentionally discriminatory retaliation.

This Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), relied on by the court of appeals, does not lead to a contrary conclusion. *Sandoval* held that Title VI prohibits only intentional discrimination and that agency regulations that go beyond that prohibition may not be privately enforced. Petitioner's claim is consistent with those holdings because he claims that respondent engaged in intentional discrimination under Title IX, not merely conduct having a discriminatory effect, and petitioner bases his claim on Title IX's prohibition against intentional discrimination, not on agency regulations that extend beyond that prohibition.

Nor does the existence of Title VII's distinct prohibition against retaliation support the court of appeals' conclusion that Title IX does not protect against retaliation. Title VII (42 U.S.C. 2000e *et seq.*) contains a series of prohibitions against particular forms of discrimination, while Title IX contains a single general prohibition against discrimination. Title IX is therefore

not analogous to Title VII, but to 42 U.S.C. 1982, which had been authoritatively construed to prohibit retaliation before Title IX was enacted.

II. Persons subjected to retaliation because they have complained about discrimination initially directed to others are fully protected by Title IX. Neither the text of Title IX nor the applicable agency regulations draw any distinction between discriminatory retaliation against persons based on whether the initial discrimination that is the subject of the complaint was directed at the complainant or others. Rather, the relevant standard is satisfied when the recipient retaliates against *any* person because that person has complained about sex discrimination.

Sullivan demonstrates that Title IX's retaliation protection extends to persons who complain about discrimination directed to others. In that case, the Court held that a white property owner could sue for retaliation even though his underlying complaint was that a black person had been subjected to unlawful discrimination.

Interpreting Title IX to cover retaliation against persons who oppose discrimination directed to others is also indispensable to the achievement of Title IX's purpose of ending intentional discrimination on the basis of sex in federally-assisted educational programs. Teachers and coaches are often the only effective advocates for their students.

Thus, persons who complain about sex discrimination are protected against retaliation by Title IX, and that protection extends to persons who complain about discrimination directed to others. The court of appeals' judgment affirming the dismissal of petitioner's complaint should therefore be reversed.

ARGUMENT

I. TITLE IX PROHIBITS RETALIATION AGAINST A PERSON BECAUSE THAT PERSON HAS COMPLAINED ABOUT SEX DISCRIMINATION, AND THAT PROHIBITION MAY BE ENFORCED IN A PRIVATE ACTION

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). Title IX does not expressly authorize a private suit to enforce its prohibition. In *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979), however, the Court held that Title IX's rights-creating language reflects a congressional intent to authorize private enforcement. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court held that Title IX authorizes private parties to seek damages for intentional violations of Title IX. Subsequent decisions have reaffirmed that Title IX authorizes private suits for intentional sex discrimination. *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-291 (1998).

Under Title IX, retaliation against a person because that person has filed a sex discrimination complaint is a form of intentional sex discrimination. Accordingly, the victim of such retaliation may file a private action under Title IX seeking redress for that retaliation. The text, background, and purposes of Title IX demonstrate that it encompasses protection against retaliation, and the court of appeals' contrary view is based on a misreading of this Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and an inappropriate comparison between Title IX and Title VII.

A. Retaliation Against A Person Because That Person Has Complained About Intentional Sex Discrimination Violates Title IX's General Ban Against Discrimination On The Basis Of Sex

Title IX broadly prohibits a recipient from subjecting any person to "discrimination" "on the basis of sex," regardless of the particular form that the discrimination takes. 20 U.S.C. 1681. That broad prohibition is subject to series of narrow exceptions that are not applicable here. 20 U.S.C. 1681. When a recipient purposefully retaliates against an individual because that individual has complained about intentional sex discrimination, as opposed to some other matter, the recipient can readily be viewed as having subjected that person to "discrimination" "on the basis of sex." Because such discriminatory retaliation falls within Title IX's general terms, Title IX's failure to refer specifically to retaliation is not controlling.

Title IX's coverage of sexual harassment provides a useful analogy. Title IX does not specifically refer to sexual harassment. But as this Court has held, recipients that are deliberately indifferent to a teacher's sexual harassment of a student "violate Title IX's plain terms." *Davis*, 526 U.S. at 643; see *Gebser*, 524 U.S. at 290. Similarly, recipients subject a student to "discrimination" "on the basis of sex" in violation of Title IX when they are deliberately indifferent to a student's sexual harassment of another student. *Davis*, 526 U.S. at 646-647. Just as Title IX's general prohibition covers sexual harassment despite the absence of any specific reference to that form of discrimination, it likewise covers intentionally discriminatory retaliation.

Under Title IX's statutory standard, not every act of retaliation against a person who has complained about sex discrimination violates Title IX. Title IX only prohibits actions taken "on the basis of sex." That limitation means that "sex" must have "actually played a role in th[e] [decision-making] process and had a determinative influence on the outcome." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). Accordingly, a recipient that retaliates against all complainers as a class, without taking into account the subject matter of the complaint, would not violate the statute. Such a person would act solely on the basis of the person's status as a complainer, not on the basis of sex. But when the recipient purposefully retaliates against a complainant because the complaint is about intentional sex discrimination, Title IX's "on the basis of sex" requirement is satisfied.[1]

B. The Background Against Which Title IX Was Enacted Confirms That Title IX Was Intended To Cover Retaliation

The legal background against which Title IX was enacted confirms that Title IX covers retaliation. Just three years before Title IX was enacted, this Court decided *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Sullivan, a white man, rented one of his houses to a black man and assigned him a membership

[1] A general nondiscrimination provision does not invariably encompass a prohibition against discriminatory retaliation. Other relevant indicators of statutory intent could show that retaliation is categorically excluded from a broad nondiscrimination provision. In the case of Title IX, however, the other indicia of legislative intent all point to the conclusion that its prohibition against discrimination on the basis of sex encompasses discriminatory retaliation.

share that permitted him to use a private park. The corporation that owned the park refused to approve the assignment because the lessee was black. When Sullivan protested that action, the corporation expelled him and took his membership shares. Sullivan sued the corporation under 42 U.S.C. 1982, which provides that "[a]ll citizens of the United States shall have the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property," and thus prohibits "racial discrimination * * * in the sale and rental of property." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968).

Of critical importance here, the *Sullivan* Court held that Sullivan could maintain an action under Section 1982 not only for having been denied the right to complete his transaction with a black person, but also for his "expulsion for the advocacy of [the black person's] cause." 396 U.S. at 237. The Court reasoned that "[i]f that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Ibid.*

Thus, just three years before Title IX was enacted, this Court construed a general prohibition on racial discrimination in the sale or rental of property to cover retaliation against persons who complain about such discrimination. A Congress familiar with *Sullivan* would have understood that, by enacting a general prohibition against sex discrimination in federally-funded educational programs, it would simultaneously forbid recipients from retaliating against persons who complain about that form of discrimination. In light of *Sullivan*, Congress would have seen no need to enact a

prohibition that specifically referred to retaliation. Because Congress is presumed to be aware of this Court's decisions, see *Cannon*, 441 U.S. at 696-698, the Court's holding in *Sullivan* that Section 1982's prohibition against intentional discrimination encompasses protection against retaliation is powerful evidence that Title IX's prohibition against intentional discrimination encompasses comparable protection. See *id.* at 698 n.22 (identifying *Sullivan* as one of the three "recently issued implied-cause-of action decisions of this Court involving civil rights statutes with language similar to that in Title IX" against which Congress enacted Title IX); see also *Franklin*, 503 U.S. at 72 (identifying *Sullivan* as one of the three cases decided in the decade before the passage of Title IX that not only recognized an implied cause of action but also approved a damages remedy).[2]

C. Interpreting Title IX To Incorporate Protection Against Retaliation Is Important To The Achievement Of Title IX's Purposes

Interpreting IX to encompass protection against retaliation also promotes the achievement of Title IX's purposes. In enacting Title IX, Congress sought to accomplish two related, but distinct objectives. "First,

[2] The decision in *Sullivan* takes on added relevance in light of the fact that the private right of action in Title IX is implied, rather than express. "Since the Court in *Cannon* concluded that this statute supported no express right of action, it is hardly surprising that Congress" did not address the scope of a retaliation remedy with the same specificity it did in statutes containing express causes of action. *Franklin*, 503 U.S. at 71; see also pp. 20-21, *infra* (contrasting retaliation language in Title VII). As the Court suggested in *Franklin*, "the state of the law" when Congress passed Title IX is of particular relevance in interpreting Title IX's implied right of action.

Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Those objectives would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.

Absent effective protection against retaliation, persons are likely to be reluctant to bring discrimination to light. And absent a sufficient deterrent against retaliation, entities that are practicing discrimination in their educational programs are likely to be emboldened to continue that discrimination. Thus, as this Court has explained, when there is no effective retaliation protection, it gives "impetus" to the "perpetuation" of the underlying discrimination. *Sullivan*, 396 U.S. at 237.

Effective protection against retaliation is particularly important because of Title IX's enforcement structure. Before an enforcement action may be brought against a recipient by either a federal agency or a private individual, an official of the recipient with authority to correct the discrimination must receive "actual notice" of the discrimination. *Gebser*, 524 U.S. at 288. A federal agency may terminate federal financial assistance only when it "has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 20 U.S.C. 1682. And a party may seek redress in a private action only upon a showing that an appropriate official of the recipient has received actual knowledge of discrimination and responded with deliberate indifference. *Gebser*, 524 U.S. at 289-290.

That enforcement structure necessarily depends on federal enforcement agencies and recipients receiving

actual knowledge of the underlying discrimination. Persons who complain about discrimination are among the most important sources for such knowledge. It would seriously undermine the effectiveness of Title IX's enforcement structure if persons who contemplate bringing allegations of discrimination to the attention of the enforcement agency or the recipient did not have effective protection against retaliation. The statutory scheme can work as intended only if persons feel secure in reporting discrimination when they believe it exists, and that sense of security is unlikely in the absence of adequate protection against retaliation.

D. Retaliation Protection Responds To A Genuine Problem That Predated Enactment Of Title IX, And There Is No Reason That Congress Would Have Wanted To Leave That Problem Unchecked

Interpreting Title IX to include protection against retaliation also makes sense because the absence of protection against retaliation was a serious part of the problem at educational institutions where discrimination was practiced before Title IX was enacted. Congress heard substantial evidence that teachers had been released, demoted, censured, and blackballed for complaining about sex discrimination at educational institutions and that teachers and students were therefore reluctant to complain about discriminatory treatment.

For example, one witness testified that it was "very dangerous for women students or women faculty to openly complain of sex discrimination on their campus. * * * At a recent meeting of professional women I counted at least four women whose contracts were not renewed after it became known that they were active in fighting sex discrimination at their respective institutions." *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess. Pt. 1 302 (1970) (*Discrimination Hearings*) (testimony of Bernice Sandler). Another witness stated that "few women have dared to file complaints of sex discrimination" because "[w]e know of a number of such cases" in which "women who have filed complaints have suffered reprisals in the form of having their jobs abolished" or "have been reassigned to some degrading position far below their capabilities in anticipation they might resign." *Id.* at 463 (statement of Daisy Fields). Another witness testified that "women who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for actions such as outright plagiarism." *Id.* at 242 (testimony of Dr. Ann Harris). And another witness testified that when a woman raised a complaint about a dormitory that was closed at a faculty meeting "blackballing letters written by faculty members were subsequently placed in her employment file at the law school without her knowledge." *Id.* at 588 (statement of Women's Rights Committee of New York University School of Law). The same witness stated that many women would speak privately about the discrimination they experienced, "but were reluctant to testify publicly for fear of reprisals." *Id.* at 247.

Documents placed before Congress contained similar evidence. One such document reported that "[a] few [women] fight back—and pay the penalty for bucking the male dominated system." *Discrimination Hearings*, Pt. 2, at 1051 (supplemental statement of Dr. Ann Harris). Another reported that "on some campuses it is still dangerous to fight sex discrimination. I know of

numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such discrimination." 118 Cong. Rec. 5812 (1972).

Thus, there was significant evidence presented to Congress that the absence of protection against retaliation had contributed to the perpetuation of discrimination at educational institutions. There is no reason that Congress would have responded to that evidence by deliberately failing to address that aspect of the problem. Rather, the more reasonable inference is that a Congress legislating just three years after the Court decided *Sullivan* operated on the assumption that its broad prohibition on discrimination would cover the kind of retaliation discussed in the congressional record. A recipient of federal assistance certainly can have no legitimate interest in retaliating against persons who complain about unlawful discrimination. Accordingly, Title IX's bar on discrimination is best understood to encompass protection against retaliation.

E. Responsible Federal Agencies Have Reasonably Interpreted Title IX To Prohibit Retaliation, And Their Interpretation Is Entitled To Deference

The Department of Education has adopted a regulation that expressly prohibits "[*i*]*ntimidatory*" and "*retaliatory acts.*" 34 C.F.R. 106.71 (incorporating by reference 34 C.F.R. 100.7(e)). That regulation provides that:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified,

> assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

Ibid. That regulation reflects the Department of Education's position that discriminatory "retaliation is prohibited by Title IX." 62 Fed. Reg. 12,044 (1997). Because the Department of Education has primary responsibility for enforcing Title IX, its interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984).

The Department of Justice is responsible for coordinating the enforcement of Title IX by federal agencies, see Exec. Order No. 12,250, 3 C.F.R. 298 (1981), and it has adopted the same retaliation regulation as the Department of Education, see 65 Fed. Reg. 52,858-52,895 (2000) (adopting Title IX rules for 21 federal agencies including the Department of Justice). The Department of Justice has also stated in a Title IX manual directed to federal agencies that retaliation is one of the "general types of prohibited discrimination." U.S. Dep't of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001) <www.usdoj.gov/crt/cor/coord/ixlegal.pdf>. Because the Department of Justice has responsibility for coordinating the enforcement of Title IX by federal agencies, its view is likewise entitled to deference. *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984).

Moreover, eight years before Title IX was enacted, the Department of Health, Education, and Welfare (HEW) issued a regulation pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, that authoritatively construed Title VI's prohibition against discrimination on the basis of race in federally assisted programs to encompass protection against discrimina-

tory retaliation. 29 Fed. Reg. 16,298, 16,301 (1964); 45 C.F.R. 80.7(e). HEW's regulation is significant because "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon*, 441 U.S. at 696.

There is no need in this case, however, to rely on agency regulations or principles of deference to resolve the question presented. The text, background, and purposes of Title IX all point to the conclusion that Title IX's prohibition against discrimination on the basis of sex incorporates protection against retaliation. The relevant agency regulations simply reinforce that conclusion.

F. The Court Of Appeals Erred In Relying On *Sandoval* And On The Existence Of Title VII's Distinct Prohibition Against Retaliation

1. The court of appeals based its conclusion that Title IX does not encompass protection against retaliation primarily on this Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Pet. App. 8a. The court's reliance on *Sandoval* was misplaced.

In *Sandoval*, the Court held that Title VI regulations that prohibit discriminatory effects cannot be privately enforced because Title VI itself prohibits only intentional discrimination, and agency regulations that go beyond Title VI's prohibition may not be privately enforced. 532 U.S. at 285-286. Because Title IX was patterned on Title VI, *Sandoval*'s analysis applies to Title IX as well. Thus, under *Sandoval*, Title IX's prohibition in Section 1681 prohibits only intentional sex discrimination, and agency regulations issued under Section 1682 may not be privately enforced to the extent that they prohibit conduct that Section 1681 does not. Neither of those aspects of *Sandoval*, however, affects the validity of petitioner's claim.

Petitioner's complaint embraces a claim that the retaliation that he suffered constitutes intentional discrimination on the basis of sex under Title IX, not discrimination that merely has the effect of discriminating on that basis. Compl. 2, para. 6; *id.* at 3, para. 8. Moreover, petitioner based his claim directly on the prohibition in Section 1681, not on agency regulations issued under Section 1682 that impose obligations that extend beyond Section 1681's prohibition. *Id.* at 3, para. 1; Pet. 11. Petitioner's claim is therefore fully consistent with *Sandoval*.

2. Petitioner relied on the Department of Education retaliation regulation to support his argument that Section 1681 encompasses protection against retaliation. Pet. App. 22a-23a. That reliance on the retaliation regulation, however, is entirely consistent with *Sandoval*.

In *Sandoval*, the Court made clear that prohibitions reflected in regulations that validly "construe the statute itself" may be privately enforced because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284. As already discussed, the federal retaliation regulations issued by the Department of Education and the Department of Justice reflect a valid interpretation of the terms of Title IX itself. Thus, under *Sandoval*, that interpretation of the statute may be enforced through the private cause of action conferred by Title IX.

In any event, as already discussed, petitioner's claim does not ultimately depend on the retaliation regulations. Rather, even without the regulations, the text,

background, and purposes of Title IX demonstrate that Title IX bars intentional sex-based retaliation. Nothing in *Sandoval* casts any doubt on that conclusion.[3]

3. The court of appeals also relied on the existence in Title VII of a separate prohibition against retaliation. See 42 U.S.C. 2000e-3(a). Pet. App. 20a n.12. The existence of that distinct prohibition, however, does not carry the implication that Title IX fails to address retaliation.

First, the core prohibitions in Title VII bar discrimination against an individual "because of such individual's [or his] race, color, religion, sex, or national origin." *E.g.*, 42 U.S.C. 2000e-2(a)(1), (2), (b) and (c). Retaliating against a person because of his role in filing a Title VII complaint might not be viewed as being based on "such individual's" race, color, sex, religion, or national origin, especially in cases analogous to this one in which the victim of the retaliation is not the victim of the underlying discrimination. Congress might therefore have deemed it advisable to make its intent to reach such retaliation clear through a distinct prohibition. On the other hand, Title IX bars discrimination

[3] Even if Section 1681 did not bar retaliation, federal agencies would still have rulemaking authority to bar that practice. See *United States* v. *O'Hagan*, 521 U.S. 642, 672 (1997) (agency with rulemaking authority may enact substantive regulations that are "reasonably designed" to prevent violations of the core prohibition); *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (agency with rulemaking authority may enact substantive regulations that are "reasonably related to the purposes of the enabling legislation"). This case, however, does not present that issue. Furthermore, agency enforcement of such a regulation alone could not fully achieve Congress's objectives. Private enforcement is necessary to achieve a sufficient level of deterrence against retaliation and to make the victims of discrimination whole. See *Cannon*, 441 U.S. at 704-708 & n.42; *Franklin*, 503 U.S. at 76.

"on the basis of sex," not because of "such individual's" sex, and that formulation is much more readily understood to encompass retaliation because an individual has complained about sex discrimination.

Moreover, in Title VII, the prohibition against retaliation is one in a series of prohibitions against discrimination in employment that specify in great detail the kind of discrimination prohibited. See, *e.g.*, 42 U.S.C. 2000e-2(a)(1) (hire, discharge, and terms and conditions of employment), 2000e-2(a)(2) (limit, segregate, or classify so as to affect employment opportunities), 2000e-2(b) (refer for employment), 2000e-2(c)(1) (membership in a labor organization), 2000e-2(d) (training and apprenticeship programs), 2000e-3(a) (retaliation), 2000e-3(b) (advertising). Title IX's prohibition against discrimination, by contrast, is contained in a single general prohibition. The appropriate comparison for Title IX is therefore not Title VII, but 42 U.S.C. 1982 and Title VI, both of which contain a single general prohibition against discrimination, and both of which had been authoritatively construed to encompass protection against retaliation before Title IX was enacted.

In sum, all of the relevant indicators of congressional intent show that Title IX encompasses protection against retaliation. The court of appeals erred in holding otherwise.

II. TITLE IX PROTECTS PERSONS WHO COMPLAIN ABOUT DISCRIMINATION THAT IS DIRECTED AT OTHERS

The court of appeals alternatively held that, even assuming that Title IX prohibits retaliation, it does not protect persons who complain about sex discrimination directed to others. Pet. App. 23a-24a. Under the court's rule, teachers and coaches who complain about

underlying discrimination directed to students cannot assert a retaliation claim under Title IX. That holding cannot be reconciled with the text, background, and purposes of Title IX.

A. The Text Of Title IX And Its Implementing Regulations Protect Persons Who Complain About Discrimination Directed To Others

1. The text of Title IX does not require that the victim of discriminatory retaliation must also be the victim of the discrimination that is the subject matter of the original complaint. It simply requires a showing that the recipient has engaged in retaliation against the complainant "on the basis of sex," and that requirement can be satisfied regardless of whether the complainant is also a victim of the underlying discrimination that was the subject matter of the original complaint. In particular, as discussed above, where the recipient engages in purposeful retaliation because an individual has complained about intentional sex discrimination, Title IX's "on the basis of sex" requirement is satisfied. In that circumstance, the person filing the complaint is *himself* a victim of discrimination on the basis of sex in the form of discriminatory retaliation without regard to whether he was also the victim of the underlying discrimination.

2. Consistent with Title IX's text, the Department of Education's retaliation regulation rejects any distinction between classes of retaliation victims. A recipient violates the regulation when it retaliates against "any" complainant "for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint [of unlawful sex discrimination]." 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)). The Department of Justice regulation is identical. See 65 Fed. Reg. 52,858-52,895 (2000).

B. *Sullivan* Makes Clear That Retaliation Claims Extend To Those Who Oppose Discrimination Against Others, And Recognizing Such A Claim Is Indispensable To The Achievement Of Congress's Goals

1. *Sullivan* also provides convincing support for the conclusion that Title IX's protection against retaliation extends to persons who complain about discrimination directed to others. The white victim in *Sullivan* complained about race discrimination directed at his black lessee, and the Court squarely held that he could maintain a private cause of action for discriminatory retaliation. The Court specifically explained that a white person may sue under Section 1982 when he can show that he was "punished for trying to vindicate the rights of minorities." 396 U.S. at 237. Because Title IX was enacted against the background of *Sullivan*, Title IX, like Section 1982, should likewise be construed to extend retaliation protection to persons who complain about discrimination directed to others.

2. Extending protection to persons where the complaint concerns discrimination directed to others is also necessary to the achievement of Congress's goal of eliminating federal support for sex discrimination and providing protection to individuals against sex discrimination. This Court concluded in *Sullivan* that a white owner is sometimes the only effective advocate for blacks who seek to purchase property. 396 U.S. at 237. Similarly, teachers and coaches are often the only effective advocates for their students. Teachers and coaches are more likely to have access to the information that is necessary to determine whether an

institution is engaged in discrimination; they are more likely to have an enduring interest in equal treatment at the educational institution; and, most important, they are more likely to have the courage and maturity necessary to make charges of discrimination and withstand the criticism that may follow. Thus, the court of appeals not only erred in holding that Title IX never prohibits retaliation; it also erred in holding that protection against retaliation does not extend to teachers and coaches who complain about discrimination directed to their students.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the

Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, DELAWARE, HAWAII, NEVADA, OREGON, SOUTH DAKOTA, TENNESSEE, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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INTEREST OF AMICI

Congress has expressly abrogated States' sovereign immunity from private claims brought under Title IX. *See* 42 U.S.C. §2000d-7(a). Accordingly, like the local school board at issue in this case, the amici States are subject to Title IX's prohibition on gender "discrimination" and are liable for any injunctive relief, monetary damages, and attorneys fees that may arise out of Title IX suits. As frequent defendants, the amici States have a strong interest in ensuring that the implied private right of action recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), is maintained within its intended boundaries and that the specific condition on the acceptance of federal funds imposed under Title IX – namely, that recipients not "discriminat[e]" on the basis of sex – is not casually extended to a new and different category of conduct.

SUMMARY OF ARGUMENT

1. Jackson's burden here is to prove that Congress actually, affirmatively, and clearly intended to create a private right of action for retaliation, not merely that Title IX can plausibly be construed to prohibit retaliation. This Court's cases make clear that a rigorous showing of congressional intent is required not only to demonstrate the existence of an implied private remedy as an initial matter, but also to justify its scope. Additionally, because Title IX is a Spending Clause statute, Jackson must show that the funding condition he seeks to enforce – a private remedy for retaliation – is stated "unambiguously" in the statute.

2. None of the traditional indicia of statutory meaning suggests an affirmative congressional intention to reach or remedy retaliation. *First*, Title IX's text does not mention retaliation; it refers only to "discrimination," which dictionaries and case law alike confirm is a comparative term. Jackson, of course, does not allege that he was disadvantaged in a comparative sense – *i.e.*, in relation to

someone else. *Second*, Jackson's position finds no support in statutory structure. Indeed, the most compelling piece of structural evidence – the fact that Title VII addresses retaliation both (i) expressly and (ii) separately from discrimination – cuts the other way. *Third*, there is nothing in the "context" surrounding Title IX's enactment – the legislative history, this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), or contemporary Title VI precedent – that evinces any affirmative congressional intention to reach retaliation. Among other problems, Jackson's contextual arguments all share a common failing in that they rest entirely on inferences from congressional silence. *Finally*, the administrative regulation on which Jackson relies, 34 C.F.R. §100.7(e), cannot support a private remedy for retaliation for the simple reason that it is not – and does not even purport to be – an "authoritative interpretation" of Title IX's ban on "discrimination."

3. Without any meaningful support in the text, structure, or context of Title IX itself – or, indeed, in the only Title IX regulation that even mentions retaliation – Jackson cannot prevail here on public-policy grounds. Initially, this Court's implied-right-of-action cases establish that arguments about a private remedy's "utility" or "desirability" are irrelevant; what matters is Congress' intent. Moreover, and contrary to Jackson's assertions, this case does not present a binary choice between (i) recognizing a private right of action for retaliation and (ii) leaving whistleblowers wholly unprotected. There remains the option of administrative enforcement – the remedy that Congress itself embraced when it enacted Title IX.

4. In any event, extension of Title IX's private remedy would be particularly inappropriate here. Jackson, a male basketball coach, does not himself claim to have been subjected to gender discrimination. Accordingly, he is not within the "special class" for whose benefit Title IX was enacted – namely, those persons (particularly women) who themselves have suffered direct gender discrimination.

ARGUMENT

The question here is whether, in the circumstances presented, Title IX entails a private right of action for retaliation. The sole criterion for answering that question is Congress' intent. None of the traditional indicia of statutory meaning – text, structure, legislative history, or even agency construction – suggests any affirmative intention to make retaliation privately actionable.

I. The Issue Is Whether Congress Actually Intended To Provide A Private Remedy For Retaliation, Not Just Whether Title IX Can Plausibly Be Construed To Prohibit Retaliation.

From the very outset, Jackson stakes his position on a particular premise – namely, that this case isn't really about whether Title IX entails a *private right of action for* retaliation but, instead, merely whether Title IX can be construed to *prohibit* retaliation. Pet. Br. 10-11. So long as Title IX can be read to prohibit retaliation, Jackson says, an implied private right of action to enforce that prohibition follows as a matter of course. And that, he claims, is because this Court recognized an implied right of action covering a Title IX claim in *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

Jackson's strategy in pitching the case as being about the "substantive scope" of Title IX (Pet. Br. 10), and not about implied rights of action, is clear enough. In order to prevail, he needs to avoid the rigorous, intent-based standard that this Court has developed over the years to govern the implied-right-of-action analysis. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001). Despite some surface appeal, Jackson's arguments about congressional intent are, with respect, pretty flimsy; to the extent his statutory arguments touch on the issue of legislative intent at all, they rely almost entirely on inferences from congressional silence. Presumably recognizing that the evidence he has will not stand up to *Sandoval*-like scrutiny, Jackson seeks to turn this into a garden-variety statutory interpretation case. His effort is misguided, for two reasons.

1. To begin with, this Court has already rejected the view that the only issue in a case like this is the "substantive scope" of the underlying statute. In *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), for instance, the Court pointedly criticized cases from the implied-right-of-action heyday for having never focused their "probe of the congressional mind" on "private rights of action, as distinct from the substantive objects of the legislation." The Court stressed the importance under modern doctrine "of enquiring specifically into intent to authorize a private cause of action." *Id.* at 1103; *see also, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 639 (1999) (Court must "do more than define the scope of behavior that Title IX proscribes"; must additionally determine whether conduct alleged "support[s] a private suit for money damages").

Jackson cannot side-step this "heightened concern" for congressional intent, *Virginia Bankshares*, 501 U.S. at 1103, simply by citing to *Cannon*. It is just not true that "[t]his case does not require the expansion of th[e] cause of action" recognized in *Cannon*. Pet. Br. 34 n.10. *Cannon* involved a traditional "discrimination" claim (the plaintiff there complained of unequal admissions practices for men and women), not a retaliation claim. It had nothing to say – one way or the other – about retaliation. *Cannon* is thus properly read to recognize an implied private right of action for core Title IX discrimination claims; it cannot fairly be understood to create a one-size-fits-all private remedy for any practice that Title IX might plausibly be construed to prohibit.

The separation-of-powers concerns that animate this Court's implied-right-of-action jurisprudence, *see, e.g., Cannon*, 441 U.S. at 730-31, 743, 746 (Powell, J., dissenting), require a rigorous showing of congressional intent not only to demonstrate the existence of an implied private remedy as an initial matter, but also to justify its scope. Again, *Virginia Bankshares* is illustrative. There, this Court addressed the question whether a minority shareholder could sue under the implied private right of action for §14(a) of the Securities Exchange Act. The Court acknowledged *J.I.*

Case Co. v. Borak, 377 U.S. 426 (1964), which had initially recognized an implied remedy in §14(a), but it did not stop there; instead, it went on to detail the showing a plaintiff must make to "extend the scope" of an existing right of action. 501 U.S. at 1102.

"Assessing the legitimacy of any such extension or expansion," the Court held, "calls for the application of some fundamental principles governing recognition of a right of action implied by a federal statute ...." *Id.* First, the Court emphasized that "recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a remedy." *Id.* (citing *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 575 (1979)). "From this," the Court continued, "the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended." *Id.* Accordingly, even where (as here) the issue is not initial recognition, but expansion, a plaintiff faces a "serious obstacle" where he cannot demonstrate a "manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as [his] theory" would entail. *Id.*

Jackson thus bears the burden here of showing "affirmative," *Sandoval*, 532 U.S. at 293 n.8, and "persuasive," *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979), evidence of Congress' intent to create in Title IX a private right of action for retaliation.

2. Separately, as a Spending Clause statute, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998), Title IX is subject to the clear-statement rule articulated in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). That rule, which exists to ensure that a recipient of federal funding exercises its choice to accept funds "knowingly" and "cognizant of the consequences of [its] participation," requires that any enforceable condition on the receipt of funds be stated "unambiguously" in the statute. *Id.* at 17.

Here, of course, the condition that Jackson seeks to enforce is a private remedy for retaliation. The question, accordingly, is not simply whether Title IX's generic

reference to "discrimination" might plausibly be interpreted to reach retaliation. Rather, the question in a case like this is whether the funding recipient "had adequate notice that [it] could be liable for *the conduct at issue*" – here, retaliation. *Davis*, 526 U.S. at 640 (emphasis added). Jackson must therefore show that private liability for retaliation, specifically, so plainly arises from "the clear terms of the relevant statute," *Barnes v. Gorman*, 536 U.S. 181, 187 (2002), that it can be said to be "unambiguous[]," *Pennhurst*, 451 U.S. at 17, or "obvious," *Gebser*, 524 U.S. at 287. That, we respectfully submit, he cannot do.

There is one final point: It would not be enough for Jackson to show (even if he could) that Title IX unambiguously prohibits retaliation. Funding recipients are also entitled under *Pennhurst* to clear notice of how a retaliation prohibition would be enforced – *i.e.*, whether by administrative action alone or by private suits, as well. Not only would a private right of action add a new layer of enforcement, leading, at the very least, to greater administrative costs, it would also bring into play an altogether different range of remedies – most notably, damages, *see Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992), and attorneys fees, *see* 42 U.S.C. §1988(b), neither of which is available in an administrative enforcement proceeding. It is easy to see how that additional exposure could affect a recipient's decision whether to accept funding. *See Gorman*, 536 U.S. at 188 ("'Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds.'" (quoting *Davis*, 526 U.S. at 656 (Kennedy, J., dissenting)). *Pennhurst*'s clear-statement rule thus requires Jackson to show "unambiguous[]" evidence not only that Title IX prohibits retaliation, but also that Congress intended to provide a private right of action for retaliation.

II. Jackson Has Not Shown A Clear Congressional Intent To Prohibit Retaliation, Let Alone To Create A Private Remedy For Retaliation.

None of the traditional indicia of statutory meaning signals a congressional intention to create in Title IX a private right of action for – or, for that matter, even to prohibit – retaliation. Each of Jackson's arguments, we admit, seems reasonable enough on the surface. But none withstands serious scrutiny. Even if Jackson's responsibility here were simply to piece together a sound interpretation of Title IX, we would say he had come up short. He certainly has not carried his burden under the more rigorous interpretive standards applicable to this case.

A. Title IX's Text Does Not Reflect A Clear Congressional Intent To Reach Or Remedy Retaliation.

In relevant part, §901 states that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). As the court of appeals correctly observed, §901 "makes no mention of retaliation at all." Pet. App. 20a. While not disputing that fact, Jackson focuses on the word "discrimination" and asserts that retaliation is "simply one variant" of that "discrimination." Pet. Br. 13. Jackson, however, offers nothing in the way of sustained textual analysis to support that assertion (which, incidentally, the Solicitor General seems to reject, at least as a thoroughgoing textual proposition, *see* U.S. Br. 10 n.1). In fact, the concepts of "discrimination" and "retaliation" are fundamentally different, both as a matter of plain meaning and as a matter of ordinary legal usage.

Standard English and legal dictionaries alike make clear that "discrimination" is a comparative term; it refers to the perception or treatment of one person or thing *in relation to others*. *See, e.g., Black's Law Dictionary* 479 (7th ed. 1999) ("Differential treatment; esp., a failure to treat all persons

equally when no reasonable distinction can be found between those favored and those not favored."); 4 *Oxford English Dictionary* 758 (2d ed. 1989) (term "discriminate" means "[t]o make a distinction; to perceive or note the difference (between things)" or "[t]o make an adverse distinction with regard to; to distinguish unfavourably from others"); *Webster's Third New International Dictionary* 648 (1986) (term "discriminate" means to "recognize as being different from others ...: distinguish between or among").

The case law is to the same effect. This Court has recognized, for instance, that "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). And indeed, pointing to this Court's precedent, Jackson himself agrees that the "normal definition of discrimination" is the "differential treatment of similarly situated groups." Pet. Br. 13 (quoting *Olmstead v. Zimring*, 527 U.S. 581, 614 (1999) (Kennedy, J., concurring in the judgment)); *see also Zimring*, 527 U.S. at 616-20 (Thomas, J., dissenting) (collecting cases defining discrimination as a comparative concept); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995) (Easterbrook, J.) ("Discrimination is a form of inequality, which poses the question: 'equal with respect to *what*?'.").[1]

The problem for Jackson is that he does not claim to have been disadvantaged in a comparative sense – *i.e.*, to have been treated unfairly in relation to someone else. Rather, Jackson's beef is with the school board's treatment of him in an absolute sense; specifically, he contends that he was given "negative evaluations" and was ultimately "terminated" from his coaching duties. J.A. 10. Unlike a

[1] There is no basis here for departing from the ordinary meaning of "discrimination" as a comparative concept. In adopting a specialized understanding of the term "discrimination" as including the seemingly non-comparative practice of isolation, the majority in *Zimring* pointed to the ADA's statutory findings, which expressly define isolation as a "form[] of discrimination." *Id.* at 588-89, 600. Title IX's text, by contrast, provides no justification, in findings or elsewhere, for straying from the usual, equality-based understanding of the term "discrimination."

typical "discrimination" claim, consideration of Jackson's complaint requires no knowledge of (and thus offers no allegations concerning) others' circumstances. Assuming the truth of the facts stated in the complaint, what happened to Jackson was wrong; it was unjustified – but it was not "discrimination." *Cf. North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("[A] female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is paid a *lower* salary for like work, given *less* opportunity for promotion, or forced to work under *more* adverse conditions *than are her male colleagues*." (emphasis added)).

We are not splitting hairs here. Dictionary definitions aside, there is a sense in the legal vernacular in which everyone knows that discrimination and retaliation are distinct concepts. Judge Posner has described them as *quintessentially* distinct. Addressing the question whether a plaintiff's false-arrest and excessive-force claims were related for attorneys-fees purposes, Judge Posner explained that they were "as different as a claim of discrimination and a claim of retaliation for opposing that discrimination." *Lenard v. Argento*, 808 F.2d 1242, 1246 (7th Cir. 1987); *see also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 387 (1979) (White, J., dissenting) (right "to be free from retaliation" is "clearly" distinct from the right "not to be discriminated against"). And indeed, Jackson's pleadings show that even he appreciates the difference. In its motion to dismiss, the school board, unable to make out the particulars of Jackson's complaint, assumed that he was attempting to assert both a "discriminat[ion]" claim and a "retaliation" claim. J.A. 13. In response, Jackson answered that, no, he was not raising a "discriminat[ion]" claim, only a "retaliation" claim. J.A. 25.

This Court faced – and rejected – a textual argument very much like Jackson's in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The question there was whether the right of action that courts had found implied in §10(b) of the Securities Exchange Act

and Rule 10b-5 could be extended to permit suits for aiding and abetting. In answering that question, the Court started from the premise that a "private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of §10(b)." *Id.* at 173 (quoted in *Sandoval*, 532 U.S. at 285-86). The primacy of statutory text, the Court observed, "bode[d] ill" for the plaintiffs because "'the language of Section 10(b) does not in terms mention aiding and abetting.'" *Id.* at 175. The same, of course, is true here; Title IX "does not in terms mention" anything about retaliation. Like Jackson here, the *Central Bank* plaintiffs sought to "overcome th[at] problem" by pointing to arguably broad statutory language. As Jackson invokes the term "discrimination," the plaintiffs there pointed to the phrase "directly or indirectly," which they said could be read to cover aiding and abetting. *Id.* at 175-76. The Court rejected the effort to finesse the statute's ordinary meaning there, and it should do so here, as well. Jackson's loose construction of the term "discrimination," like other attempts at loose construction before his, would impermissibly "'add a gloss to the operative language of the statute quite different from its commonly accepted meaning.'" *Id.* at 174 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976)).

B. Statutory Structure Does Not Indicate A Clear Congressional Intent To Reach Or Remedy Retaliation.

Jackson's reading of §901 finds no support in the statutory structure. In fact, the most compelling piece of structural evidence cuts the other way.

1. As the court of appeals emphasized, the absence of an anti-retaliation provision in Title IX stands in stark contrast to this Nation's other major gender-discrimination statute, Title VII. *See* Pet. App. 20a. In Title VII, Congress dealt with employment discrimination in one statutory section, 42 U.S.C. §2000e-2, and then addressed retaliation, expressly, in an altogether separate section, 42 U.S.C. §2000e-3(a). Title VII's structure teaches two things about Title IX's meaning.

First retaliation is not, as a textual matter, "simply one variant of discrimination." Pet. Br. 13. If it were, Title VII's express prohibition of retaliation would be superfluous, having been subsumed under §2000e-2's general anti-discrimination provision. Second, when Congress wants to address retaliation, it knows how to do so and does so expressly. "The fact that [Congress] enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor" for retaliation. *Transamerica*, 444 U.S. at 21.

The implication that arises from Title VII's structure – that Title IX does not reach, much less remedy, retaliation – is in no way undermined by the fact that Titles VII and IX originated in separate Acts. For one thing, this Court has never confined itself to the provisions of the statute in question in determining whether the express prohibition of conduct in one place suggests its exclusion in another. In *Central Bank*, for instance, in refusing to extend the scope of §10(b)'s implied right of action to include aiding-and-abetting liability, the Court looked to statutes wholly outside the securities-law context; even the fact that those seemingly far-flung statutes explicitly addressed secondary liability, the Court concluded, weighed against the extension of §10(b)'s implied remedy. *See* 511 U.S. at 182-83 (reviewing, *e.g.*, Internal Revenue Code, National Bank Act, Federal Reserve Act, and Packers and Stockyards Act); *see also Transamerica*, 444 U.S. at 20-21 (looking to 1933 Securities Act and 1934 Securities Exchange Act to construe 1940 Investment Advisors Act). As in *Central Bank*, context and structure indicate that Congress has "taken a statute-by-statute approach," 511 U.S. at 182 – here, to the issue of retaliation. Title VII expressly addresses it; Title IX does not.

Moreover, the structural inference is stronger here than *Central Bank*, for two reasons. First, Title VII and Title IX are derived from separate Acts only in the most formal sense. Title IX, of course, "'was patterned after Title VI of the Civil Rights Act of 1964.'" *Sandoval*, 532 U.S. at 280 (quoting

Cannon, 441 U.S. at 694). When Congress enacted the Civil Rights Act of 1964, which included both Titles VI and VII, it addressed retaliation only in Title VII. Where, as in that instance, "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983). That same presumption – that Congress intentionally omitted any prohibition on retaliation from Title VI – carries over to Title VI's clone, Title IX.

Second, although Titles VII and IX technically arise from separate Acts, and although Title IX is principally patterned on Title VI, Congress clearly had its eye on Title VII when enacting Title IX. Indeed, Congress expressly modeled at least one provision of Title IX – §901(b), designed to prohibit quotas, 20 U.S.C. §1681(b) – on a provision of Title VII, 42 U.S.C. §2000e-2(j). *See Cohen v. Brown Univ.*, 101 F.3d 155, 174-75 (1st Cir. 1996) ("Section 1681(b) was patterned after §703(j) of Title VII ...."). Plainly, then, Congress knew how to incorporate Title VII standards and provisions when it wanted to. It did not do so with respect to retaliation.

2. Jackson and his amici offer two structural arguments of their own, neither of which is persuasive. First, Jackson emphasizes that §901's prohibition of discrimination "is followed by a list of nine detailed exceptions." Pet. Br. 12. "That structure," he asserts, "indicates that Congress intended to prohibit all types of discrimination except for the particular forms of discrimination expressly excepted from Title IX's coverage." Pet. Br. 13. If the exceptions catalogued in §901(a)(1)-(9) really did address particular "forms of discrimination," as Jackson says, his argument might have some force. But they don't. Instead, the exceptions are for particular types of *institutions* – certain religious schools, traditionally single-sex schools, fraternities and sororities, and so on. Jackson seeks to draw an inference about the kinds of discrimination prohibited by Title IX from

the kinds of institutions exempted from Title IX's scope. With respect, there is no logic in that.[2]

Second, Jackson points to a veterans-benefits statute, 38 U.S.C. §516(d), which refers, in part, to "discrimination, including retaliation." Pet. Br. 13. That provision, Jackson says, demonstrates that retaliation is "a form of" discrimination. There are two problems. As an initial matter, it seems to us just as likely that the structural inference runs in the opposite direction: Section 516(d) simply shows that when Congress wants to define discrimination to include retaliation, it does so expressly. Indeed, Jackson's reliance on §516(d) undermines any *textual* argument he might be trying to make. If retaliation really were just part and parcel of the term "discrimination," then the phrase "including discrimination" in §518(d) would be redundant. The second problem is that just as often, Congress treats "discrimination" and "retaliation" as distinct wrongs giving rise to distinct claims. For one notable example, see The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Pub. L. 107-174, Title II, 116 Stat. 566 (2002) ("Discrimination and Retaliation"), and the committee report accompanying the same, S. Rep. 107-143, at 7 (Apr. 15, 2002) (referring to "discrimination or retaliation complaints"). *See also, e.g.*, 44 U.S.C. §3507(e)(3)(B) ("retaliation or discrimination").

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[2] Jackson's effort to obscure the unfavorable comparison to Title VII suffers from a similar logical flaw. Jackson contends that Titles VII and IX are "crucial[ly]" different in that Title IX speaks to "discrimination" generally while Title VII "spells out in detail the specific forms of conduct that violate the statute." Pet. Br. 34. Thus, Jackson insinuates, courts shouldn't expect the same level of precision with respect to retaliation in Title IX that Title VII offers. The problem, again, is that Title VII does not detail the "specific forms of conduct" that constitute "discrimination" under the statute. Instead, it specifies *areas* (hiring and firing, compensation, etc.) and *organizations* (employment agencies, labor unions, etc.) in which "discrimination" is prohibited. Fundamentally, Title VII separately prohibits two kinds of conduct: discrimination, 42 U.S.C. §2000e-2, and retaliation, 42 U.S.C. §2000e-3(a). Title IX only addresses the former.

C. The "Context" Surrounding Title IX's Enactment Does Not Suggest A Clear Congressional Intent To Reach Or Remedy Retaliation.

Jackson's argument from contemporary "context" is likewise bereft of any "affirmative" evidence, *see Sandoval*, 532 U.S. at 293 n.8, that Congress intended to create a private right of action for (or, for that matter, even to prohibit) retaliation. Jackson relies on three specific aspects of the context in which Title IX was enacted. None is availing.

1. *Legislative History.* Title IX's legislative history is "sparse." *Grove City Coll. v. Bell*, 465 U.S. 555, 566 (1984), *superseded in part by statute*, 20 U.S.C. §1687. Because the principal sections of Title IX – §§901 and 902 – "originated as a floor amendment, no committee report discusses the provisions." *North Haven*, 456 U.S. at 527. Accordingly, this Court has said that the "only authoritative indications of congressional intent regarding the scope of §§901 and 902" are the floor statements of Senator Birch Bayh, Title IX's Senate sponsor. *Id.*

Jackson, though, does not rely (nor could he, as we will show) on Senator Bayh's statements to demonstrate that Congress intended Title IX to reach retaliation. Instead, Jackson points to what he calls "extensive testimony" presented to a House subcommittee during the summer of 1970. Pet. Br. 19-20; *see also, e.g.*, U.S. Br. 5, 14 ("substantial evidence"); ABA Br. 8-9 ("substantial testimony"). That testimony, Jackson says, shows that "sex discrimination in educational programs frequently takes the place of retaliation." Pet. Br. 19. Even aside from the fact that "[t]he proposal on which the hearings were held ... never emerged from committee," *North Haven*, 456 U.S. at 523 n.13, there are two problems with Jackson's reliance on those hearings.

The first problem is specific to the hearing testimony itself – and, in particular, to the characterization of that testimony as "extensive" and "substantial." Jackson and his amici have pointed to snippets of five witnesses' statements to the House subcommittee as indicative of Congress' intent.

See Pet. Br. 19-20; U.S. Br. 15-16. Even if those five witnesses had testified expressly that Congress should prohibit or provide a private remedy for retaliation – none did – any inference of congressional intent would be pretty weak. Consider that the hearings from which Jackson and his amici have mined their testimony (i) spanned seven days; (ii) included 183 statements, letters, articles, etc., from 84 witnesses, commentators, etc.; and (iii) filled 1261 transcript pages. Against that backdrop, a handful of anecdotes about retaliation, without any express call for congressional action targeting it, doesn't amount to much.

The second problem is one endemic to any attempted reliance on hearing testimony as evidence of Congress' intent. This Court has consistently accorded little, if any weight, to such testimony. *See generally* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 264 n.193 (collecting cases). And with good reason. Even aside from its other well-documented shortcomings, *see* Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 Hofstra L. Rev. 1125, 1131-32 (1983), hearing testimony in and of itself tells us nothing about how Congress responded – or didn't, as the case may be – to the witnesses' concerns.

Jackson's point seems to be that, having heard the five witnesses' testimonies, snippets of which recounted acts of retaliation, Congress *must* have intended to remedy retaliation. As the Solicitor General puts it, "[t]here is no reason that Congress would have responded to that evidence" by failing to address it. U.S. Br. 16; *see also id.* at 6 ("There is no reason that Congress would have wanted ...."). But that is not an argument based on any "affirmative" evidence of congressional intent. It is an argument based, at most, on an inference from congressional silence. At the end of the day, neither Jackson nor any of his amici (including, with respect, Senator Bayh) has pointed to a shred of evidence in the legislative record of any actual congressional intent to reach retaliation. *See* Bayh Br. 13-18.

Nor has our own review revealed any such evidence. Two particular aspects of Title IX's legislative history are worth noting. First, the House report that was the culmination of the 1970 hearings makes no mention of retaliation. On the contrary, in summarizing the hearing testimony (and, in that connection, the House precursor to Title IX), the report refers to the prohibited "discrimination" exclusively in the usual, comparative, equality-based sense. *See* H.R. Rep. No. 92-554, *reprinted in* 1972 U.S.C.C.A.N. 2462, 2511-12 (Oct. 8, 1971) (targeted "discrimination" entails, *e.g.*, requiring women "to meet higher admission standards than men" and "sex differences in rank and salary"). Second, the evidence from the floor debates is uniformly to the same effect. Time and again, Senator Bayh referred to the "discrimination" with which Title IX was concerned in terms of the "differential treatment" of, and "disparit[ies]" between, men and women. *E.g.*, 118 Cong. Rec. 5804, 5805, 5807 (Feb. 28, 1972); 117 Cong. Rec. 30407 (Aug. 6, 1971). To make his point, Senator Bayh repeatedly cited statistics comparing men's and women's circumstances with respect to hiring, promotions, pay, admissions, enrollment, and scholarships. 118 Cong. Rec. 5804, 5805, 5809. Indeed, at one juncture, having offered one of these line-by-line comparisons, Senator Bayh stated that this was the "type of discrimination to which I refer." 117 Cong. Rec. 30403.

2. *The* Sullivan *Decision.* Jackson and his amici likewise seek to rely, as an aspect of contemporary context bearing on congressional intent, on this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). *Sullivan*, Jackson says, "held" that 42 U.S.C. §1982, which prohibits discrimination in property transactions, "also protects from retaliation those who complain about such discrimination," and thus "established th[e] principle" that statutory bans on discrimination "are construed to include prohibitions on retaliation." Pet. Br. 8, 14. From *Sullivan*, Jackson asserts, it can be inferred that Congress "presumably intended" Title IX's prohibition on "discrimination" to entail an unstated remedy for retaliation, as well. Pet. Br. 21. As put by the

Solicitor General, in the light of *Sullivan*, Congress "would have understood" that a ban on discrimination would "simultaneously forbid" retaliation, and thus "would have seen no need" to address retaliation specifically. U.S. Br. 11-12.

Jackson's reliance on *Sullivan* as proof of Congress' intent is misplaced. First, as a summary of his arguments makes clear, Jackson's position is not founded on any affirmative evidence of congressional intent. Rather, it, too, rests on an inference from congressional silence. *See also* ABA Br. 3 ("Congress would have had no reason to assume ...."); New York Lawyers Br. 14 ("Congress certainly contemplated ...."). Perhaps that inference would be warranted had *Sullivan* said in so many words what Jackson claims it said - namely, that a general ban on discrimination necessarily entails a prohibition on retaliation. But, as we show next, it did not.

Jackson and his amici point to a paragraph in *Sullivan* that does, in fairness, address a neighborhood association's expulsion of a white homeowner (Sullivan) "for the advocacy of [his black lessee's] cause." 396 U.S. at 237. And the paragraph does state that Sullivan had been "punished for trying to vindicate the rights of minorities protected by §1982." *Id.* But far from climaxing - as Jackson suggests - with a resounding affirmation that any statutory prohibition on discrimination necessarily entails a corollary remedy for retaliation, the paragraph concludes (with something of a thud) by stating, cryptically, that *Sullivan* "ha[d] standing to maintain" his lawsuit. *Id.* And, indeed, *Barrows v. Jackson*, 346 U.S. 249 (1953), which the *Sullivan* Court cited for support, was purely a third-party standing case; it had nothing to do with private rights of action. *See id.* at 255-60.

There is no evidence that *Sullivan* was understood - let alone universally understood - in the years leading up to Title IX's passage the way that Jackson characterizes it today. Indeed, even Justice Harlan, dissenting in *Sullivan*, was unsure of what to make of the Court's decision. With respect to the issue of "relief for Sullivan," Justice Harlan called the majority opinion "highly elliptical." 396 U.S. at

251 (Harlan, J., dissenting). The opinion, he said, did not in any way "explain[] what legal standards should determine Sullivan's rights under §1982"; instead, it "simply state[d] that 'Sullivan has standing to maintain this action' under §1982." *Id.* at 254. That, Justice Harlan said, could mean any number of things for private-right-of-action purposes. Indeed, Justice Harlan imagined four possibilities, only one of which seems to bear any resemblance to a modern-day retaliation claim. *See id.* at 255 ("Or does the Court think that §1982 gives Sullivan a right to relief from injuries that result from his 'legitimate' protest aimed at convincing the Board to accept Freeman?"). Perhaps not surprisingly, we are also not aware of any indication that lower courts had, in the period preceding Title IX's enactment, construed *Sullivan* to "establish[] th[e] principle" (Pet. Br. 8) that a prohibition on "discrimination" necessarily entails a remedy for retaliation. A computer search designed to identify any such decisions produced none.

Jackson's reliance on *Sullivan* also faces the separate problem that §1982 and Title IX were enacted pursuant to different constitutional powers and, accordingly, are subject to different interpretive principles. Section 1982 is "authorized by the Enabling Clause of the Thirteenth Amendment" – arguably the most sweeping grant of federal power in the Constitution – and is thus to be given the broadest possible construction. 396 U.S. at 235. As a Spending Clause statute, by contrast, Title IX is subject to *Pennhurst*'s rule that its conditions be clear and unambiguous. Thus, even if *Sullivan* had definitively construed §1982's prohibition of discrimination to reach retaliation, that construction would not necessarily carry over to the Title IX context.

3. *Contemporary Title VI Precedent.* One final piece of context to which Jackson points as evidence of Congress' intent in enacting Title IX is the state of Title VI law in the years leading up to 1972. *See, e.g.*, Pet. Br. 21-22. Jackson is right to look to pre-1972 Title VI precedent; this Court said in *Cannon* that "[t]he drafters of Title IX explicitly assumed

that it would be interpreted and applied as Title VI had been during the preceding eight years." 441 U.S. at 696. But a review of Title VI case law fails to demonstrate anything approaching a consensus that Title VI even reached retaliation, much less made it privately actionable.

According to our research, none of the 17 cases cited in *Cannon* as evidence that by 1972 Title VI "had already been construed as creating a private remedy," *id.* at 696 & n.21, dealt with, or even mentioned, retaliation. Nor, for that matter, are we aware of any Title VI case (Jackson has pointed to none) during the 1964-1972 era adjudicating a retaliation-based Title VI claim. To be sure, there are several cases – we have found three, including the lone case Jackson cites, *United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (5th Cir. 1967) (en banc) – that refer elliptically to retaliation. *See also United States v. Medical Soc'y of S.C.*, 298 F. Supp. 145, 158 (D.S.C. 1969); *Moses v. Washington Parish Sch. Bd.*, 276 F. Supp. 834, 855 (D. La. 1967). But importantly for present purposes – discerning the 1972 Congress' view of the scope of Title VI itself – those were not cases in which retaliation formed the basis of any plaintiff's Title VI claim; rather, retaliation was an issue in those cases only insofar as the judges involved had inserted prophylactic anti-retaliation provisions into broad remedial decrees.

* * *

Even aside from the arguments' individual weaknesses, a common problem pervades Jackson's efforts to conjure congressional intent from the contemporary context in which Title IX was enacted: In the absence of any direct evidence that Congress thought about retaliation one way or the other when drafting Title IX, Jackson's arguments rest entirely on inferences from Congress' silence. *See, e.g.*, Pet. Br. 21 ("Congress presumably intended ...."); New York Lawyers Br. 11 ("Congress must have been aware ...."); ABA Br. 7 ("Congress therefore had reason to understand ....").

Central Bank – which, like this case, involved the scope of an existing implied right of action – expressly rejected the very sort of inferential reasoning that Jackson urges here.

The question there, again, was whether the implied right of action recognized under Securities Exchange Act §10(b) should be construed to reach aiding-and-abetting claims. Having held that "[t]he text d[id] not support" the proposed extension, 511 U.S. at 180, the Court went on to consider an argument that parallels Jackson's position here almost precisely: The SEC contended that "Congress legislated with an understanding of general principles of tort law and that aiding and abetting liability was 'well established in both civil and criminal actions by 1934.'" *Id.* at 181. "Thus," its argument went, "'Congress intended to include' aiding and abetting liability in the 1934 Act." *Id.*

This Court refused to credit this invocation of what it called "implicit congressional intent." *Id.* at 183. "Even assuming ... a deeply rooted background of aiding and abetting tort liability," the Court held, "it does not follow that Congress intended to apply that kind of liability to the private causes of action in the securities Acts." *Id.* at 184. Finding no direct evidence of an affirmative intention to include aiding-and-abetting liability within the scope of the §10(b) implied remedy, this Court held – in words equally applicable here – that it was "not plausible to interpret the statutory silence as tantamount to an implicit congressional intent" to extend the right of action to impose that liability. *Id.* at 185. *See also Touche Ross*, 442 U.S. at 571 ("[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.").

D. The Administrative Regulation That Jackson Invokes Cannot Be Read To Create A Private Remedy For Retaliation.

Jackson also asks this Court to defer to an administrative regulation promulgated by the Department of Education, *see* 34 C.F.R. §100.7(e), that, he says, definitively "interpret[s] Title IX's core prohibition on discrimination" to reach retaliation. Pet. Br. 9. In relying on the regulation, Jackson seeks to bring himself within the ambit of this Court's statement in *Sandoval* that regulations that "authoritatively

construe the statute itself" may be enforced through an implied right of action applicable to that statute, because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of that statute to be so enforced as well." 532 U.S. at 284. In *Sandoval*, of course, the Court held that Title VI's disparate-impact regulations do not qualify because they "forbid conduct that §601 permits," namely, unintentional discrimination. *Id.* at 285. By contrast, Jackson asserts, §100.7(e) does "not extend the protection of Title IX beyond its terms" but, instead, "reflect[s] an 'interpretation of the terms of Title IX itself.'" Pet. Br. 33.

Jackson is wrong. In order to trigger the permissive treatment outlined in *Sandoval*, Jackson and his amici repeatedly describe §100.7(e) – as incorporated for Title IX purposes, *see* 34 C.F.R. §106.71 – as an authoritative "interpretation," or "construction," of §901's ban on "discrimination." *E.g.*, Pet. Br. 3, 4, 9, 21, 27, 29, 33; U.S. Br. 6, 16, 17, 19; New York Lawyers Br. 9, 12, 15-16; Leadership Conf. Br. 12-13. But in fact, §100.7(e) is not, and does not purport to be, an authoritative interpretation of the term "discrimination." It is instead, as we will show, merely a procedural rule governing the conduct of administrative investigations. This case, accordingly, does not concern the kind of regulation posited by the Court during oral argument in *Sandoval* – that is, "an interpretive regulation which [is] not precluded by [the Court's] case law" in that it does not "say that you don't have to have intentional discrimination," but says instead that "this is what intentional discrimination consists of." Tr. of Oral Arg. 26. That, as we said then, might be "a harder case." *Id.* But it is not *this* case.

In relevant part, the regulation Jackson cites provides that –

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section [901] of the Act

> or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. §100.7(e). Jackson and his amici correctly point out that subsection (e) is titled "Intimidating or retaliatory acts prohibited." What they uniformly fail to acknowledge is the larger context in which subsection (e) is situated.

Section 100.7 itself – of which subsection (e) is a part – is titled "Conduct of investigations." And the context could not be clearer that it is official, administrative investigations by the Department of Education to which the regulation is addressed. Subsection (a) requires Department officials to perform periodic compliance reviews of fund recipients; subsection (b) authorizes individuals to file administrative complaints with Department personnel; subsection (c) briefly describes the sort of investigation the Department should conduct; and subsection (d) addresses how the Department will resolve investigations. *It is against that backdrop* that subsection (e) prohibits retaliation against individuals who cooperate in official Department investigations. Section 100.7(e), therefore, is at most a valid §902 regulation aimed at "effectuat[ing]" §901's discrimination prohibition. *See Sandoval*, 532 U.S. at 281-82 (assuming validity of §602 regulations "proscribing" conduct not within the core of §601). It is *not* an "authoritative interpretation," *id.* at 284, of §901's ban on "discrimination" to include retaliation – or, for that matter, even a generally applicable prohibition of retaliation.

Additional context confirming that §100.7(e) is merely a procedural rule for the conduct of administrative investigations – and not an authoritative interpretation of §901 itself – is found in 34 C.F.R. §106.71, the regulation that incorporates §100.7(e) for Title IX purposes. Section 106.71, titled "Procedures," adopts and incorporates the "procedural provisions" applicable to Title VI and states that "[t]hese procedures" are found at 34 C.F.R. 100.6-100.11 and 34 CFR, Part 101." Like §100.7(e) itself, all of the regulations

cross-referenced in §106.71 concern "the practice for hearings, decisions, and administrative review conducted by the Department of Education." 34 C.F.R. §101.1; *see also, e.g.*, 34 C.F.R. §§100.6 ("Compliance information"), 100.8 ("Procedure for effecting compliance"), 100.9 ("Hearings"), 100.10 ("Decisions and notices"), 100.11 ("Judicial review").

As a "procedural provision[]," §100.7(e) stands in stark contrast to other Title VI and Title IX regulations that at least arguably do "interpret" or "construe" those statutes' bans on "discrimination." Both sets of regulations, for instance, contain "Definitions" sections explaining all manner of terms. *See* 34 C.F.R. §§100.13 (Title VI), 106.2 (Title IX). Notably, neither defines the term "discrimination" to include retaliation – or, for that matter, mentions retaliation at all. Section 100.7(e) also contrasts with substantive regulations aimed specifically at fleshing out the contours of prohibited "discrimination." On the Title IX side, for instance, §106.21 prescribes both "[g]eneral" and "[s]pecific prohibitions" on discrimination in admissions; it says nothing about retaliation. Similarly, §106.31 prescribes "[g]eneral" and "[s]pecific prohibitions" on discrimination in educational and extracurricular programs; again, nothing about retaliation. Sections 106.37 and 106.51 prohibit a number of specific forms of discrimination in financial aid and employment, respectively; neither says anything about retaliation. Likewise, the principal substantive regulation implementing Title VI's ban on discrimination, titled "Discrimination prohibited," identifies and proscribes both "[g]eneral" and "[s]pecific discriminatory actions" but does not mention retaliation. 34 C.F.R. §100.3.

It is in these definitional and substantive regulations – not in §100.7(e)'s "procedural provision[]" – that one might expect to find an authoritative construction of §901's ban on "discrimination." Indeed, every one of the cases cited in *Sandoval* as involving "authoritative interpretation[s]," 532 U.S. at 284, dealt with regulations that explicitly defined or interpreted ambiguous statutory terms or phrases. *Chevron* itself, for instance, concerned an EPA rule expressly defining

the term "stationary source" as used in the Clean Air Act. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). Likewise, the Court in *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995), deferred to an OCC letter-ruling expressly construing the National Bank Act's phrase "incidental to the business of banking." *Id.* at 257. The same, notably, is true of the various cases the *Sandoval* Court cited as having "'assumed' that a cause of action to enforce a statute includes one to enforce its regulations." 532 U.S. at 284. Those cases, too, concerned "authoritative" agency constructions in the *Chevron* sense – *i.e.*, regulations that, by their very terms, set out to define or interpret ambiguous statutory language. *See NCAA v. Smith*, 525 U.S. 459, 467-68 (1999) (regulation expressly defining term "recipient" in "Definitions" provision); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 280 (1987) (regulation expressly defining terms "physical impairment" and "major life activities" in "Definitions" provision); *Bazemore v. Friday*, 478 U.S. 385, 408-09 (1986) (White, J., joined by four other Justices, concurring) (regulation expressly identifying "[d]iscrimination prohibited" under statute); *Alexander v. Choate*, 469 U.S. 287, 304-05 & n.25 (1985) (same); *Lau v. Nichols*, 414 U.S. 563, 567-68 (1974) (same).

Indeed, even the regulation at issue in *Sandoval* itself – which, of course, the Court found categorically beyond the authoritative-construction pale and thus ineligible for enforcement pursuant to Title VI's implied right of action – at least purported to interpret the statutory term "discrimination" in a way §100.7(e) does not. The regulation there, titled "Discrimination prohibited," expressly identified both "[g]eneral" and "[s]pecific discriminatory actions." 28 C.F.R. §42.104. The "procedural provision[]" on which Jackson relies here doesn't even do that. Thus, in a very real sense, Jackson's invocation of §100.7(e) to support his retaliation claim is even more strained than the regulation-based argument this Court rejected in *Sandoval*.

III. Jackson's Reliance On Title IX's Perceived "Purposes" And "Policies" Is Misplaced.

Without any meaningful support in the text, structure, or context of Title IX itself – or, as we have just shown, in the only Title IX regulation that even mentions retaliation – Jackson's position boils down to public policy. At bottom, that is, Jackson's argument is not so much that retaliation *is* discrimination but, instead, that an additional layer of protection against retaliation would facilitate the operation of Title IX's anti-discrimination provision. Jackson repeatedly asserts, for instance, that protection from retaliation is "critical to the effectiveness" of Title IX's prohibition on gender discrimination (Pet. Br. 2) and important if the statute "is to achieve its underlying purposes" (Pet. Br. 9). *See also, e.g.*, Pet. Br. 22-26 ("critical to achieving the statute's purposes"); U.S. Br. 12-14 ("important to the achievement of Title IX's purposes"); Women's Sports Br. (entire brief devoted to policy arguments); Women & Families Br. (same). Specifically, Jackson contends that Title IX could not achieve its objectives if recipients of federal funds "felt free to retaliate" against those who complain about prohibited discrimination. Pet. Br. 22.

We will leave it to the experts to set the public-policy record straight. *See generally* Br. for National School Boards Association *et al.* Our purpose here is to point out two fundamental legal problems with Jackson's policy arguments. First, they are irrelevant here. As *Sandoval* makes clear, this Court has long since "abandoned th[e] understanding" – once the governing rule for implied-right-of-action cases – that "'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute." 532 U.S. at 287 (quoting *Borak*, 377 U.S. at 433). Under what the *Sandoval* Court called the "*ancien regime*," *id.*, a federal court could imply a right of action whenever "that remedy [was] necessary or at least helpful to the accomplishment of the statutory purpose" or, put another way, could provide some "effective assistance to achieving statutory purposes."

Cannon, 441 U.S. at 703, 708. Under the Court's current, more restrained approach, it does not "matter how desirable [a right of action] may be as a policy matter, or compatible with the statute"; all that matters is "[s]tatutory intent." *Sandoval*, 532 U.S. at 286-87; *accord, e.g., Central Bank*, 511 U.S. at 177, 188 ("[p]olicy considerations" irrelevant except to show result "'so bizarre' that Congress could not have intended it"); *Thompson v. Thompson*, 484 U.S. 174, 187 (1988) (Court "'will not engraft a remedy on a statute, no matter how salutary'" (quoting *California v. Sierra Club*, 451 U.S. 287, 297 (1981))); *Transamerica*, 444 U.S. at 15-16, 23 (relevant issue not "utility" or "desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute" but, rather, "whether Congress intended to create the private remedy asserted").[3]

There is another problem. Jackson and his amici frame this case as offering the Court a binary choice: either (i) it must recognize an implied right of action for retaliation or (ii) it will leave those who complain about discrimination wholly unprotected. Absent the implication of a private remedy for retaliation, the argument goes, recipients of federal funds will feel "free to retaliate" against (Pet. Br. 22) and "free to punish" (New York Lawyers Br. 7) complainants - who, in turn, will be "without recourse" (Women & Families Br. 16). Jackson's message is clear: without a private cause of action, those who complain about discrimination cannot be "safe from reprisal." Pet. Br. 12.

But the choice is not all or nothing. There remains an intermediate remedial option - namely, the option Congress itself envisioned when it enacted Title IX in the first place. Even absent a private right of action under §901, the

[3] *Musick, Peeler & Garrett v. Employers Ins. of Wassau*, 508 U.S. 286 (1993), which may at first blush appear to turn on policy considerations, is distinguishable. There, the Court held that Rule 10b-5's implied right of action allows for contribution among joint tortfeasors. Key to the decision was the fact that a contribution remedy merely allocates liability for a wrong - securities fraud - that the Court had "already deemed actionable under federal law." *Id.* at 292. Here, by contrast, the question presented is whether retaliation *should* be "deemed actionable under" Title IX.

Department of Education retains the power under §902 to proceed against retaliators administratively. As the Solicitor General acknowledges, "[e]ven if Section 1681 did not bar retaliation, federal agencies would still have rulemaking authority to bar that practice." U.S. Br. 20 n.3; *see also Gebser*, 524 U.S. at 292 (agencies may enforce requirements "that effectuate [Title IX's] antidiscrimination mandate, 20 U.S.C. §1682, even if those requirements do not purport to represent a definition of discrimination under the statute"). Accordingly, federal agencies may target retaliation under Title IX even where private suitors may not.

Pursuant to its administrative-enforcement authority, the Department may "take such remedial action as [it] deems necessary to overcome the effects" of discrimination. 34 C.F.R. §106.3. That remedial action may of course include the ultimate sanction of terminating federal funding. But the Department needn't go so far every time. Rather, the regulations make clear that it may first attempt to remedy violations "by informal means" and, failing that, by "the suspension" of funds. *Id.* §100.8 (incorporated in 34 C.F.R. §106.71). And, indeed, the Department itself touts its "flexible approach" to enforcement, including, *e.g.*, "voluntary resolutions," "agreements with recipients," "violation letters," and "negotiations." U.S. Department of Education Office of Civil Rights, Annual Report to Congress: Fiscal Years 2001 and 2002 (July 2003), www.ed.gov/about/offices/list/ocr/AnnRpt2002. Finally, as Senator Bayh himself explained during the debate on Title IX, the mere threat of terminating a recipient's federal funding will often convince it to change its ways: "The civil rights experience ... indicates that the very possibility of such a sanction has worked wonders." 117 Cong. Rec. 30408.

Jackson suggests - without ever really explaining why - that administrative enforcement is not an "effective remedy against reprisal." Pet. Br. 22; *see also* U.S. Br. 13 ("effective protection," "sufficient deterrent"). Jackson's amici likewise contend, for instance, that "administrative procedures are less efficient mechanisms for enforcing Title IX" and that

private lawsuits are "more efficient." Women's Sports Br. 22-23. But, in so arguing, Jackson and his amici are, with respect, just penciling in their reasoning in reverse: because the remedy that Congress did provide (administrative enforcement) is in some sense not ideal, this Court ought to imply a remedy that Congress did not. This Court has rejected precisely that sort of argument before, and should do so again here. *See, e.g., Touche Ross*, 442 U.S. at 578 ("The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.").

IV. Any Extension Of A Private Remedy Beyond Direct Victims Would Impermissibly Expand The "Special Class" For Whose Benefit Title IX Was Enacted.

There is a final reason that this case is particularly ill-suited to the creation of a private right of action for retaliation: Jackson, a male basketball coach, does not himself claim to have been subjected to gender discrimination. (Any suggestion in Jackson's brief to the contrary, *see* Pet. Br. 41-43, is inconsistent with his position in the lower courts. *See supra* at 9.) Accordingly, Jackson is "plainly not within the class meant to be protected by Title IX." Pet. App. 23a. Jackson asserts that there is "no basis in precedent" for limiting Title IX's coverage to direct victims of discrimination. Pet. Br. 38. With respect, he is wrong.

This Court's cases have repeatedly emphasized that a key consideration in deciding whether to recognize a private remedy is "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member." *Cannon*, 441 U.S. at 689. Indeed, even in the heyday of implied private rights, the decisive question was whether the statute in question "was enacted for the benefit of a special class"; if so, a court could recognize a remedy "for members of that class." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 375 (1982); *see also Cort v. Ash*, 422 U.S. 66, 78 (1975) (whether "the plaintiff [is] 'one of the class for whose *especial* benefit the statute was enacted'" (quoting *Texas &*

Pac. R. Co. v. Rigsby, 241 U.S. 33, 39 (1916))); *Sierra Club*, 451 U.S. at 294 ("particular class of persons").

Cannon is instructive as to the "special class" protected by Title IX. The Court there concluded that a female who had been denied equal treatment in university admissions "because of her sex," 441 U.S. at 680 – and had thus *herself* been subjected to traditional gender discrimination – could bring a cause of action because she was "clearly a member of that class for whose special benefit [Title IX] was enacted," *id.* at 694. Nothing in *Cannon*, or in any other Title IX case, suggests that Congress cast a wider net. To the contrary, there can be little question that the "special class" for whose benefit Title IX was enacted comprises those individuals – typically women – who suffer direct gender discrimination. One simply cannot read Title IX's legislative history and come away with any other conclusion. Again, from the entire legislative record, Jackson has mustered only five anecdotal references (in hearing testimony) that refer to retaliation at all. *See supra* at 14-15. Notably, only two of those can even arguably be construed to touch on retaliation for complaints about discrimination against others. *See Discrimination Against Women: Hearings Before the Special Subcomm. on Education of the House Comm. on Educ. & Labor*, 91st Cong., 2d Sess. 242, 302 (1970). In contrast to that void, the legislative history is littered with references to "discrimination against women," *e.g.*, 118 Cong. Rec. 5804, 5807, 5809, in the form of "differential treatment" and "disparit[ies]" in virtually every aspect of education, *e.g.*, 118 Cong. Rec. 5804, 5805, 5807; 117 Cong. Rec. 30407. *Cf. also* Women & Families Br. 11 ("Women [a]re at a [h]eightened [r]isk of [r]etaliation ...."), 12 ("[W]omen complaining of sex discrimination are all too frequent targets of retaliatory actions ....").

Accordingly, Jackson would have the Court go two steps beyond *Cannon*: first, by expanding the scope of Title IX's implied right of action from core discrimination to include retaliation claims, as well; and then, even assuming a retaliation cause of action generally, by extending the class

of plaintiffs who may sue on that cause of action beyond direct victims who are Title IX's "unmistakable focus." *Cannon*, 441 U.S. at 691. Jackson has offered no compelling basis for taking either step, let alone both.

CONCLUSION

We close with a practical point. Over the years, Congress has proven itself fully capable of legislatively overruling interpretations of Title IX with which it disagrees. In *Grove City College v. Bell*, 465 U.S. 555 (1984), for instance, this Court held that that Title IX was "program-specific" – *i.e.*, that the receipt of grants by some students at a federally-funded college did not trigger institution-wide coverage under Title IX, but, instead, imposed Title IX obligations only on the financial aid program. *Id.* at 573-74. Believing that *Grove City* too narrowly construed Title IX, Congress promptly passed, over a presidential veto, the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, §3(a), 102 Stat. 28 (1988), which reinstated a rule of institution-wide application for Title IX. *Cf. also* 42 U.S.C. §2000d-7 (abrogating state immunity for Title IX actions in response to *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)).

Ordinarily, of course, Congress' demonstrated ability to respond to a particular statute's judicial interpretation might not cut decisively in either direction; whatever this Court's decision, the argument would go, Congress can step in to "fix" it. But here, for all of the reasons explained in Part I, the burden was on Jackson to show that Congress actually, affirmatively intended to create a private remedy for retaliation. He has not done so. Given the prevailing presumption against implying private rights of action and the clear-statement rule that applies to Title IX as a Spending Clause statute, the more prudent course now is for this Court to proceed with caution and to decline to create a cause of action that Congress did not. In staying its hand, the Court will put the ball back where it belongs – in Congress' court.

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

With more than 408,000 members, the American Bar Association ("ABA" or "Association") is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States. The ABA's mission is, in part, to serve the public and the profession by promoting justice and respect for the law.[2]

In August 1975, the ABA's policymaking House of Delegates adopted policy urging "the prompt, vigorous, and effective implementation and enforcement of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*, which promotes equal educational opportunity without regard to sex, to the full extent of the powers granted in the statute." In August 2004, the House of Delegates adopted policy reaffirming the 1975 policy and clarifying "that retaliation constitutes a form of discrimination prohibited by Title IX for which a private right of action exists to enforce the statute." In the intervening years, the ABA actively supported the right of women and girls to protection from discrimination in education, advocated passage of related civil rights legislation that would augment those protections, and encouraged full enforcement of Title IX by the Executive Branch.

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than the *amicus curiae*, its members, and its counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA's record of dedicated advocacy supporting equal opportunity for women and girls in public education is consistent with the Association's commitment to equal opportunity for women and girls generally, including in the legal profession. Among its official institutional goals, Goal IX seeks the "full and equal participation of women, minorities and persons with disabilities in the legal profession." Consistent therewith, the ABA Commission on Women in the Profession, for example, pursues the full and equal participation of women in the ABA, the legal profession, and the justice system by assessing the status of women in the legal profession (including legal education) and identifying barriers to their advancement, thus reflecting the purpose and spirit of Title IX.

More broadly, this Court's decision whether a private right of action to bring a retaliation claim exists under Title IX most assuredly will affect the ability of ABA members to achieve Association Goal II: "To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition." For, as explained herein, without a private right of action against retaliation under Title IX, the ability of lawyers to effectively vindicate Title IX rights on behalf of those subjected to gender discrimination nationwide will be severely curtailed.

SUMMARY OF ARGUMENT

Congress intended Title IX to provide victims of retaliation with a private right of action. When Congress enacted Title IX, it was aware that the courts had interpreted the civil rights statutes of the Reconstruction era and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, neither of which explicitly refers to retaliation, to cover retaliation implicitly. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (finding an implicit

prohibition against retaliation in 42 U.S.C. § 1982). Accordingly, Congress would have had no reason to assume that similar statutory language in Title IX would be construed differently than Title VI and the Reconstruction era civil rights statutes.

The legislative history of Title IX, both before and after its initial enactment, reflects Congress's understanding that the statute would be interpreted as covering retaliation. Among other things, Congress refused to alter regulations submitted to it by the Executive Branch that expressly prohibited retaliation under Title IX. *Cf. N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531-34 (1982) (noting the significance of Congress's refusal to alter administrative regulations as proposed). Although Congress later amended Title IX on several occasions, including to reverse certain judicial interpretations of the statute, it has never acted to alter the statute's implementation in accordance with the regulations prohibiting retaliation.

Through Title IX, Congress sought not only to prevent the use of federal resources to support discriminatory practices in education, it also "wanted to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). The administrative process provides no means for complainants to present evidence or to advocate their case, and "even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant." *Id.* at 706 n.41. Thus, access to the courts is particularly important with respect to retaliation claims under Title IX, whose enforcement largely depends on the willingness of third parties, such as teachers and coaches, to contest discrimination on their students' behalf. Congress intended through Title IX to eradicate gender discrimination in the educational setting, an objective that, consistent with this Court's understanding of anti-discrimination law in other

contexts, requires providing access to the courts to remedy retaliation.

ARGUMENT

I. CONSISTENT WITH ESTABLISHED PRECEDENT, CONGRESS INTENDED TO PROVIDE PROTECTION AGAINST RETALIATION WHEN IT ENACTED TITLE IX.

When Congress enacted Title IX in 1972, the courts, including this one, had universally recognized that retaliation is a form of intentional discrimination proscribed by the civil rights statutes. The courts had held, in a variety of cases involving statutes which, like Title IX, do not expressly refer to retaliation, that those laws implicitly covered retaliation as a form of prohibited discrimination because their enforcement so heavily depends on protection for persons who raise claims of violations. Congress was well aware of these decisions when enacting Title IX. *See Cannon*, 441 U.S. at 696-97.

A. Congress Enacted Title IX Against a Landscape of Judicial Precedent That Recognized Retaliation as a Form of Discrimination Prohibited by Civil Rights Statutes.

Three years before Title IX's passage, the Court concluded that retaliation is a form of discrimination covered by 42 U.S.C. § 1982,[3] even though that statute does not mention retaliation expressly. *See Sullivan v. Little Hunting*

[3] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C § 1982.

Park, Inc., 396 U.S. 229 (1969).[4] In construing the statute, the Court recognized that providing relief against retaliation is necessary to the statute's effective enforcement. *See id.* at 237-38. The Court further held that Section 1982's implicit prohibition against retaliation applied irrespective of whether the victim of retaliation had sought protection of the statute with respect to discrimination against himself or rather discrimination against another person. *See id.* The plaintiff in *Sullivan* was a Caucasian who was expelled from a private corporation in retaliation for opposing the corporation's racially exclusive (anti-African-American) leasing policy, and the Court recognized that, if a state court judgment sustaining the white complainant's expulsion "[could] be imposed, then [petitioner would be] punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* at 237.[5]

In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court noted the necessity of a private action to redress the retaliation alleged in order to protect the underlying right, because absent such redressability, fundamental rights "would

[4] As the Fourth Circuit has observed, *Sullivan* was wholly ignored by the Court of Appeals in the decision below. *See Peters v. Jenney*, 327 F.3d 307, 318 n.10 (4th Cir. 2003). Accordingly, *Peters* held that Title VI's ban on intentional discrimination also bans retaliation and is enforceable through private suit.

[5] This Court and the lower courts have understood the potential evils of retaliation in a wide variety of contexts. *See, e.g., Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *Hanson v. Hoffmann*, 628 F.2d 42, 52 (D.C. Cir. 1980) ("The creation of a right is often meaningless without the ancillary right to be free from retaliation for the exercise or assertion of that right.").

in effect be penalized and inhibited." *Id.* at 597.[6] *See also Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973) (allowing white members of defendant swimming pool association to plead claims under 42 U.S.C. § 1981 and Section 1982 for adopting a restriction that prevented them from bringing their black guest to the pool).[7]

Congress was aware of these decisions when it enacted Title IX. In addition, it was aware that the lower courts, in interpreting Title VI of the Civil Rights Act of 1964 ("Title VI"), which served as the template for Title IX, had recognized retaliation as a form of discrimination prohibited by and actionable under that preexisting statute. *See, e.g., United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836,

[6] In *Perry*, a state college instructor alleged that the decision not to rehire him was an act of retaliation against him for public criticism of the regents who supervised the college. *See Perry*, 408 U.S at 594-95. The instructor asserted violations of the First and Fourteenth Amendments, whose express terms, like those of Section 1983, nowhere mention the word "retaliation."

[7] Although this Court has not addressed retaliation claims under Section 1981 (providing that all citizens have "the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," 42 U.S.C. § 1981), the Courts of Appeals for the First, Second, and Sixth Circuits have held that this statute contains an implied right of action for retaliation. *See Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9 (1st Cir. 1979); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975). The First Circuit held that the statute provides an implied right of action "against any other person who, with a racially discriminatory intent, injures [the plaintiff] because he made contracts with non-whites." *Des Vergnes*, 601 F.2d at 14. Similarly, the Court of Appeals for the D.C. Circuit has acknowledged that other circuits have recognized an "[i]mplicit . . . cause of action protecting people from private retaliation for refusing to violate other people's rights under § 1981 or for exercising their own § 1981 rights." *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1279-80 (D.C. Cir. 1994).

888 n.110 (5th Cir. 1966) (Wisdom, J.) (finding that African-American students enjoy protection against retaliation for exercising their rights under Title VI to attend desegregated schools), *adopted en banc*, 380 F.2d 385, 389 (5th Cir. 1967). Congress therefore had reason to understand that Title IX would cover retaliation as a form of prohibited gender discrimination. *See also Cannon*, 441 U.S. at 696 n.20 (relying on lower court interpretation of Title VI to demonstrate that Congress intended to create a private right of action under Title IX, because a private right of action already had been recognized in Title VI).

In fact, judicial and congressional recognition of retaliation as a form of discrimination prohibited by Title VI, the civil rights statutes, and the Equal Protection Clause has been so universally accepted that private rights of action for retaliation have been enforced for nearly forty years. Until the Eleventh Circuit issued its ruling in this case, no court in any jurisdiction had held otherwise in any published decision.[8]

B. Congress Intended That Title IX Cover Retaliation as a Form of Discrimination Prohibited by the Statute.

In light of the pre-Title IX case law interpreting anti-discrimination statutes as implicitly encompassing protection from retaliation, the fact that Congress did not include a specific prohibition on retaliation in Title IX is not surprising:

[8] The only other court to reach a similar conclusion likewise did so based on arguments from another *pro se* plaintiff, and the opinion in that case has since been reversed. *See Litman v. George Mason Univ.*, 156 F. Supp. 2d 579 (E.D. Va. 2001), *rev'd*, No. 01-2128, 2004 WL 345758, slip op. (4th Cir. Feb. 25, 2004). Notably, the plaintiff in *Peters v. Jenney*, unlike Mr. Jackson, was represented by counsel on appeal and was supported by an *amicus* brief submitted by the United States.

it reflects the legislators' understanding that such a prohibition is inherent in the ban against discrimination in federal anti-discrimination law. Indeed, the legislative history of Title IX provides substantial evidence that Congress considered retaliation as a type of discrimination warranting remediation under Title IX.

Congress explicitly emphasized that Title IX was designed to extend the anti-discrimination mandates of Title VII of the Civil Rights Act of 1964, which includes a prohibition against retaliation, to the educational setting.[9] *See* H.R. Rep. No. 92-554 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2467 (Title IX "further amends existing law to . . . [r]emove the exemption of persons employed in educational institutions from the equal employment provisions of the Civil Rights Act.").[10] Such an extension would be incomplete absent incorporation of the prohibition on retaliation. Indeed, Congress heard substantial testimony regarding numerous incidents of retaliation against persons complaining of gender discrimination in the

[9] Both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, expressly provide private rights of action for retaliation. When Congress extended the protections of Title VII and the ADEA to federal sector employees, it did not reference such rights expressly, *see* 42 U.S.C. § 2000e-16(a); 29 U.S.C. § 633a, but the courts have found those rights to be implicitly included as just another form of prohibited discrimination. *See, e.g., Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981); *White v. Gen. Servs. Admin.*, 652 F.2d 913, 917 (9th Cir. 1981); *Canino v. EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); *cf. Forman v. Small*, 271 F.3d 285, 296-98 (D.C. Cir. 2001) (same for federal sector employees provision of ADEA).

[10] The fact that Title VII expressly prohibits retaliation, while Title IX does not, does not suggest a contrary conclusion. *See Cannon*, 441 U.S. at 711 ("The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.").

educational setting. *See, e.g.*, Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor, 91st Cong. 242 (1970) (testimony of Dr. Ann Harris) ("women who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for actions such as outright plagiarism").

In 1975, subsequent to Title IX's passage, the U.S. Department of Health, Education and Welfare ("HEW") promulgated regulations interpreting the statute. As required by law at the time, HEW submitted these regulations to Congress for review.[11] Congress deliberated at length[12] and, following significant debate, rejected each and every attempt to modify or disapprove the regulations.[13] These regulations included an express prohibition on retaliation. *See* 40 Fed. Reg. 24,128, 24,155 (1975), *codified at* 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7(e), which states that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [section 901] of the Act or this part, or because he has made a

[11] Section 431(d)(1) of the General Education Provisions Act, Pub. L. No. 93-380, 88 Stat. 567, as amended 20 U.S.C. § 1232(d)(1) (repealed in 1994), provided that in addition to publishing a regulation in the Federal Register, the regulation must be transmitted to Congress and "shall become effective not less than forty five days after such transmission unless the Congress shall, by concurrent resolution, . . . disapprove such [regulation]."

[12] The House Subcommittee on Postsecondary Education of the House Committee on Education and Labor held six days of hearings on the regulations. *See* Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong. (1975).

[13] *See* S. Con. Res. 46, 94th Cong., 121 Cong. Rec. 17,300 (1975); H.R. Con. Res. 310, 94th Cong., 121 Cong. Rec. 19,209 (1975).

complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this part").[14] Congress clearly knew and understood how HEW interpreted and intended to enforce Title IX, including its prohibition on retaliation. *Cf. N. Haven*, 456 U.S. at 531-34 (noting the significance of Congress's refusal to alter the Title IX regulations as proposed).

Since the adoption of the implementing regulations, Congress has never suggested any disagreement with their provision of protection against retaliation. This is not for want of opportunity to address the issue. In fact, Congress has repeatedly amended Title IX when it thought its intent was being misconstrued. Following the Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which held that a nonconsenting State could not be sued for violations of the Rehabilitation Act, Congress explicitly amended Title IX and similar statutes to reflect its intent to abrogate the states' sovereign immunity thereunder. *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845 (1986) (*codified at* 42 U.S.C. § 2000d-7

[14] The successor U.S. Department of Education later readopted these regulations in 1980. Title IX Regulations, 45 Fed. Reg. 30,955 *et seq.* (May 9, 1980). The U.S. Department of Justice, which is responsible for coordinating the implementation and enforcement of Title IX by all executive agencies, specifically has emphasized the importance of retaliation claims for effective enforcement. *See* U.S. Dep't of Justice, Civil Rights Division, Title IX Legal Manual at 71-72 (Jan. 11, 2001) *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf ("*Retaliation protections are designed to preserve the integrity and effectiveness of the enforcement process itself.* ... Retaliation claims have their own remedial purpose in that they seek to ensure that rights created under a federal civil rights statute do not go unenforced for fear of adverse reaction. This goal is undercut if recipients are allowed to retaliate against persons subject to their authority who publicly object to discrimination against others.") (emphasis added); Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980) (charging Department of Justice by Executive Order with Title IX enforcement powers).

(2002)). Likewise, in response to *Grove City College v. Bell*, 465 U.S. 555 (1984), in which the Court construed Title IX as regulating sex-based discrimination only in those specific programs that receive federal assistance, Congress amended Title IX's definition of "program or activity" to make express its intent to apply Title IX's broad mandates institution-wide. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (*codified at* 20 U.S.C. § 1687 (2002)); *see generally Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72-73 (1992) (discussing the significance of Congress's subsequent amendments to Title IX to cure constructions with which it disagreed).[15] The fact that Congress has, on several occasions, directly focused on Title IX as applied under the Executive Branch's regulations, and has never indicated any disagreement with those regulations' prohibition on retaliation, indicates Congress's intent that Title IX include such a prohibition.

C. This Court's Title IX Jurisprudence Further Demonstrates That the Statute Prohibits Retaliation Against Persons Who Seek To Enforce It.

Since its initial determination that Title IX provides a private right of action in the courts, *Cannon*, 441 U.S. at 706-08, the Court has held that the statute covers a broad array of types of discrimination not expressly mentioned in the statute

[15] In fact, Congress affirmatively rejected proposed amendments to Title IX that would have narrowed its apparent scope. In 1975, Senator Helms introduced a bill that would have added a provision to Title IX stating that "[n]othing in [§ 901] shall apply to employees of any educational institution subject to this title." S. 2146, 94th Cong. § 2(1) (1975); *N. Haven*, 456 U.S. at 534-35 (describing post-enactment legislative history). Similar efforts by Senator McClure in 1976 failed as well. *N. Haven*, 456 U.S. at 535.

itself. The Court has found that Title IX prohibits teacher-student sexual harassment, *Franklin, supra; Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), student-on-student sexual harassment, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999), and employment discrimination, *N. Haven, supra*. Further, Title IX provides for the full complement of remedies for victims of such actions. *Franklin, supra*. In finding that Title IX reaches these various forms of gender discrimination, the Court understood that all such forms were implicitly embraced in Title IX's broad proscription against "[excluding] participation in, [denying] the benefits of, or [subjecting] to discrimination" a person "on the basis of sex."[16] Similarly, retaliation for complaining about activity proscribed by Title IX should be understood to be "[excluding] participation in, [denying] the benefits of, or [subjecting] to discrimination" "on the basis of sex."

A determination that Title IX does not recognize a right of action for retaliation would be starkly at odds with this Court's Title IX jurisprudence. As the Court has previously observed, "There is no doubt that 'if we are to give [Title IX] the scope its origins dictate, we must accord it a sweep as broad as its language.' " *N. Haven*, 456 U.S. at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)); *see also Dickerson v. New Banner Inst. Inc.*, 460 U.S. 103, 118 (1983) (emphasizing that statutes must be interpreted "in light of the purposes Congress sought to serve"). The Court has yet to find that Title IX's prohibition of discrimination "on the basis of sex" limits a cause of action or means of recovery, and this case provides no grounds for doing so now.

[16] 20 U.S.C. § 1681.

II. THE INTENDED BENEFICIARIES OF TITLE IX WILL NOT BE ADEQUATELY PROTECTED IF THE COURTS CLOSE THEIR DOORS TO RETALIATION CLAIMS.

"Title IX, like its model Title VI, sought to accomplish two related . . . objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second it wanted to provide individual citizens *effective protection* against those practices." *Cannon*, 441 U.S. at 704 (emphasis added). As the Court recognized in this articulation of Title IX's purposes, the first congressional objective can be served through the administrative process and its withdrawal of federal funding, while the second congressional objective can only be achieved through the courts, because only the courts have the power to enter the injunctive relief or to award the monetary damages necessary to make victims whole. *See id.* at 704-08; *Gebser*, 524 U.S. at 284-85 (1998); *Davis*, 526 U.S. at 639-40; *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001) ("[I]t is . . . beyond dispute that private individuals may sue to enforce" Title VI and Title IX).

The *Cannon* Court thoroughly explained the importance of the administrative and judicial enforcement mechanisms of Title IX and how these mechanisms complement and supplement each other. *See Cannon*, 441 U.S. at 704-08 (noting the HEW's position that the "individual remedy will provide effective assistance to achieving the statutory purpose"). The availability of these complementary enforcement mechanisms is just as important for achieving Title IX's statutory purpose regarding retaliation as it is for addressing other forms of discrimination, because administrative remedies alone are insufficient to make whole the victims of such discrimination.

A. Effective Enforcement of Title IX Requires Access to the Judicial System Because Administrative Remedies Alone Are Insufficient.

The Office for Civil Rights ("OCR") in the Department of Education ("DOE"), the administrative body that oversees Title IX retaliation claims, has limited enforcement powers. Unlike the Equal Employment Opportunity Commission and other administrative bodies that oversee discrimination claims, the DOE-OCR only has one remedy available for complainants: the termination of federal funds. *See* 20 U.S.C. § 1682. It has no authority to order an educational institution to remedy discrimination, to reinstate a wrongfully terminated employee, or to pay such an employee back pay or monetary damages. Essentially, DOE-OCR has no ability to remedy the actual harms suffered by an individual complainant. Therefore, judicial enforcement through a private right of action is the only realistic way to make such a person whole or provide him or her with "effective protection." *See, e.g., Franklin*, 503 U.S. at 76 (monetary damages in private suit appropriate since administrative action would leave complainant "remediless").[17]

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[17] Although the threat of termination of federal funding should encourage educational institutions to comply with Title IX, the DOE never has withheld federal funding for a Title IX violation, despite well-documented noncompliance. *See* U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, Draft Report for Commissioners' Review, Ten-Year Checkup: Have Federal Agencies Responded to Civil Rights Recommendations? Vol. IV at 31 (May 2004), *available at* http://www.usccr.gov/pubs/10yr04/10yr04.pdf (hereinafter "Civil Rights Evaluation") (finding that between 1996 and 2003 OCR did not defer or terminate federal financial assistance for a Title IX violation). Thus, the administrative threat has done little to promote actual compliance. In contrast, commentators have argued that the threat of private litigation

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Moreover, judicial enforcement through a private right of action is the only realistic way for a complainant to achieve the purpose of his complaint – the elimination of discrimination. People who complain about discrimination in a federally funded program want to end the discrimination, not the program.

The administrative process also does not provide any means for complainants to present evidence or to advocate their case. In fact, they are completely excluded from the process. As this Court has noted:

> [The Title IX] complaint procedure adopted by HEW does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant.

Cannon, 441 U.S. at 706 n.41. Thus, the *Cannon* Court recognized that administrative remedies are not always

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encourages schools to remedy discriminatory practices before having to face lawsuits. *See, e.g.*, Gary L. Galmore, Congressional Research Service, Title IX and Sex Discrimination in Education: An Overview 2-3 (Mar. 4, 2003) (finding that pressure for stronger enforcement of Title IX has come largely as a result of court suits rather than through agency action); National Association of State Boards of Education, Sexual Harassment in Schools: A Policy Guide at 6, 18 (1998), *available at* http://www.nasbe.org/Educational_ Issues/Reports/Sexual%20Harrass.pdf (finding that *Franklin* seized the attention of educators and that educators now "have a vested financial interest in preventing sexual harassment"). If complainants were not protected from retaliation, administrative enforcement would become less effective, because fear of retaliation would deter the filing of administrative complaints.

sufficient by themselves to remedy harms of the intended beneficiaries and that, therefore, to fulfill congressional intent, a private right of action must exist to supplement the administrative process. *See id.* at 705-06 ("The award of individual relief to a private litigant . . . is not only sensible but is also fully consistent with – and in some cases even necessary to – the orderly enforcement of the statute.").

In addition to being excluded from the administrative enforcement process, a Title IX complainant also cannot compel the OCR to investigate a claim in a timely manner. Instead, OCR generally enters into a voluntary resolution with the offender with no involvement of the complainant. In fact, the complainant usually knows nothing about the resolution until after it is completed and has no effective means of challenging it as inadequate.[18]

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[18] Commentators have found additional problems with the OCR complaint process that limit opportunities of complainants to exercise Title IX rights. *See* American Association of University Women ("AAUW") Legal Advocacy Fund, A License for Bias: Sex Discrimination, Schools and Title IX 52-54 (2000) (hereinafter "A License for Bias"). For instance, OCR will not even consider a complaint if it is made after OCR's six-month statute of limitations, a considerably shorter limitations period for Title IX complaints than that of state and federal courts. *See id.* at 52 (noting also that lack of knowledge of Title IX or OCR is not considered by the OCR as grounds for an extension of the limitations period). Furthermore, although OCR can refer a case to the Department of Justice for litigation if it cannot reach a resolution with an offender, it has never done so for Title IX. *See* Civil Rights Evaluation at 31 (finding OCR has referred only two cases to DOJ for judicial enforcement, one under Title VI and one under the Rehabilitation Act). Indeed, the OCR also is deficient in its initiated compliance reviews for Title IX violations, the alternative mechanism to complaint resolution for OCR to regulate civil rights compliance. *See id.* at 30 (finding that "due to competing priorities OCR is not conducting compliance reviews on girls' access to and participation in advanced math and science education"); A License for Bias at 13, 30-31 (finding that while sex discrimination complaints accounted for 10 percent of OCR's caseload

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Furthermore, a victim of discrimination or retaliation obtains no benefit from the termination of federal funding. To the contrary, such potential termination could harm the victim and all persons at an educational institution by eliminating essential programs. Termination of federal funding for an entire school would be a harsh penalty for isolated discrimination or retaliation against one student or one employee. Under such circumstances, withdrawing federal funds from schools further punishes the students who experienced discrimination by taking away funds that would be used to educate them. Thus, Congress intended funding termination to be a "last resort" remedy and neither the only nor even the preferred remedy. *Cannon*, 441 U.S. at 705 n.38 (noting that Congress itself recognized the severity of the fund-cutoff remedy and that " '[i]n most cases, alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy' ") (quoting 110 Cong. Rec. 7067 (1964) (statement of Sen. Ribicoff)). Holding otherwise in this case would deprive the statute of much of its intended ability to root out sex discrimination, as the limitations of DOE-OCR's available remedies stand as substantial deterrents to exposing such discrimination.

B. The Protection of Third Parties, Such as Teachers and Coaches, from Retaliation Is Critical to Effective Enforcement of Title IX.

Access to the courts for teachers and coaches to redress retaliation is especially important under Title IX and other civil rights-in-education statutes. Title IX violations take place not only in a university setting but also in

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during 1993-1997, the agency devoted only 3.2 percent of its compliance reviews to this area).

secondary and elementary schools, where students face forms of discrimination similar to those found in higher education.[19] Students in the lower age brackets especially may not understand whether a violation has occurred, may lack information on how to complain about any harm recognized, or may be intimidated from voicing any complaint. As minors, they are also legally prohibited from bringing any actions on their own behalf and must rely on adults, such as their parents, to enforce their rights for them.

In many cases, teachers, coaches, and other adult employees are the first to notice or witness discriminatory treatment.[20] They also have access to the documents, budgets, and other evidence of discrimination that students do not. And, they often participate in the decisions that lead to discrimination. If they are not protected from retaliation, then

[19] *See, e.g., Davis*, 526 U.S. at 629 (Title IX case involving fifth-grade female student who suffered persistent sexual advances by fellow student); *Gebser*, 524 U.S. at 277-78 (Title IX case involving sexual misconduct of high school teacher with student that started in eighth-grade); *Communities For Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805 (W.D. Mich. 2001) (Title IX case against high school athletic association finding that female high school athletes were denied benefits of school athletic programs); *Haines v. Metro. Gov't of Davidson City*, 32 F. Supp. 2d 991 (M.D. Tenn. 1998) (Title IX case involving ten-year-old female student who was sexually harassed by two eleven-year-old students).

[20] *See, e.g.*, U.S. Department of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (explaining that under DOE-OCR standards "in addressing allegations of sexual harassment, the judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX").

they may not point out the discrimination at that time to stop it from happening in the first place.[21]

Denying a private right of action to remedy retaliation under Title IX would work a manifest injustice on students and third parties alike, wholly contrary to the intent of Congress for full and effective enforcement of the civil rights laws of the United States.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

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[21] Third parties may be in a better position to bring complaints against an institution. *See, e.g.*, U.S. Department of Education, Office of the Undersecretary, Educator Sexual Misconduct: A Synthesis of Existing Literature at 31 (June 2004) *available at* http://preview.ed.gov/rschstat/research/pubs/misconductreview/report.pdf ("Schools are a place where teachers are more often believed than are students and in which there is a power and status differential that privileges teachers and other educators.").

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IN THE
Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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This Brief Amicus Curiae in support of Petitioner is filed by former Senator Birch Bayh.[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

Birch Bayh served as United States Senator for the State of Indiana from 1963 to 1981. In that capacity, he was the author and principal Senate sponsor of the provision that ultimately was enacted as Title IX of the Higher Education Act of 1972, 20 U.S.C. § 1681 *et seq.*

Senator Bayh has had a life long commitment to the establishment and protection of civil rights and of equal rights for women. In particular, prior to the passage of Title IX, he was the principal sponsor of the Equal Rights Amendment in the Senate and led the debate for its proponents on the floor of the Senate. Since the adoption of Title IX, he has testified before both Congressional Committees and an Executive Branch Commission concerning the elimination of sex discrimination.[2]

Senator Bayh previously submitted a Brief Amicus Curiae in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), in which the Court upheld the validity of regulations promulgated by the Department of Education

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[1] Blanket consents to the submission of amicus briefs are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, Amicus states that this Brief was not authored or funded by any person or entity other than Amicus or his counsel.

[2] *See* "Title IX: Thirty Years Later", Hearings before the Senate Health, Education, Labor and Pension Committee, 107th Cong., 2d Sess. (June 27, 2002); "Title IX and Science", Hearings before the Subcommittee on Science, Technology and Space of the Senate Committee on Commerce, Science and Transportation, 107th Cong., 2d Sess. (Oct. 3, 2002); Hearings before the Secretary's Commission on Opportunity in Athletics, United States Department of Education (Aug. 27, 2002).

under Title IX that prohibited sex discrimination with respect to employment in federally funded education programs. The Court stated that his remarks on the floor of the Senate are an authoritative guide to the construction of Title IX. *North Haven*, 456 U.S. at 526-527.

SUMMARY OF ARGUMENT

Title IX prohibits sex discrimination in federally funded education programs, subject only to narrowly defined exceptions for educational institutions with unique missions. The court of appeals held that Title IX does not prohibit retaliatory discrimination because the term "retaliation" does not appear in the language of the statute. However, its conclusion is incorrect. Congress consciously drafted Title IX to apply to all forms of sex discrimination in education, including retaliation. Further, with respect to the specific context in which this lawsuit arises – employment – Congress included no exception to its broad prohibition against sex discrimination. As confirmed by a thorough and critical assessment of the legislative history, Congress intended that Title IX would prohibit the insidious practice of retaliation.

The sponsors of Title IX were personally familiar with historical efforts to eliminate racial discrimination and sex discrimination. During the Civil Rights Movement of the 1950s through the 1970s, Americans of all colors, creeds, religions, and sexes concluded that the time had come to put aside all forms of discrimination in our society, including racial and gender discrimination; that all necessary and reasonable steps should be taken to accomplish that goal; and that effective enforcement devices should be created to vindicate these rights.

One manifestation of the commitment to prohibit discrimination against women was the introduction in Congress of the proposed Equal Rights Amendment of the Constitution. Amicus curiae was Chairman of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, which held hearings on the proposed Amendment starting in 1970. The hearings demonstrated that women faced a large number of insidious discriminatory practices. For example, the hearings showed that women consistently were denied wages equal to those of their male co-workers. Women also were denied access to the most challenging and desirable employment opportunities. Farm women who toiled side-by-side with their husbands, or wives who were business partners with their husbands, were denied equal opportunity to inherit jointly-owned property. In some States, women were consistently sentenced to more severe penalties than men for similar crimes.

Worst of all, the hearings developed conclusive evidence that girls and women were denied equal opportunities in the nation's educational system. As a result, 52% of the nation's citizens were being denied development of their intellectual and athletic skills. They also suffered discrimination in employment, tenure, promotion and compensation in education. The hearings generated a determination in Congress to right these injustices.

The proposed Equal Rights Amendment progressed slowly through Congress and faced the prospect of a lengthy ratification process in the States. In this environment, amicus curiae and his colleagues determined that the evidence of sex discrimination in education was so compelling that problems in this specific area should be redressed as rapidly as possible, without awaiting the completion of the comprehensive effort to prohibit

discrimination in all sectors through amendment of the Constitution.

In 1972, the Senate accepted a floor amendment offered by amicus curiae and added Title IX to the Higher Education Act by voice vote. Thereafter, the House accepted the Senate amendment, and Title IX became law on June 23, 1972. In sweeping language and in the most basic terms, Title IX provided that girls and women would no longer be subjected to the multi-faceted forms of blatant discrimination that they had faced over the years in the nation's educational system.

This Court has played an indispensable role in the progress that has followed the enactment of this landmark legislation. In a series of decisions, the Court has upheld the substantive rights protected by Title IX and has recognized that Congress intended that victims of discrimination have the remedies necessary to accomplish the goal of eliminating all forms of discrimination in federally funded education programs. For example, the Court has recognized that Congress intended to create a private right of action, *Cannon v. University of Chicago*, 441 U.S. 677 (1979); that the prohibition against sex discrimination in education applied to employment, *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982); and that the private right of action under Title IX applies to suits for damages, *Franklin v. Gwinett County Board of Education*, 503 U.S. 60 (1992).

This case involves another critically important aspect of the struggle against sex discrimination in education. It presents the question whether the prohibition against discrimination in Title IX, and the concomitant private right of action, prohibit retaliation based on a person's having complained about a school system's discriminatory practices. Effective enforcement of the statute depends heavily upon

the willingness of educators who believe they have witnessed discrimination to be free of discrimination in turn for having had the courage to try to vindicate the right established by Congress. Further, the question arises in the context of athletic participation by young women, which is a critical aspect of their education. Continued progress toward equality for women in education and in later life depends importantly upon the effort to insure equal opportunity for young women athletes at the high school level.

The legislative history demonstrates that the Congress that adopted Title IX intended to build upon the civil rights laws that prohibited racial discrimination and extended those laws to prohibit retaliatory discrimination in education.

ARGUMENT

I. THE PLAIN LANGUAGE OF TITLE IX AUTHORIZES ACTIONS FOR SEX DISCRIMINATION BY RETALIATION.

Title IX prohibits discrimination against a person who complains about unlawful sex discrimination in a federally funded education program or activity and grants a private right of action to any person who has been the victim of such retaliation. Title IX provides, in pertinent part:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

The principal part of Title IX prohibits, in sweeping terms, all acts of discrimination on the basis of sex against any "person" by an educational institution in any education program or activity that receives federal financial assistance. Title IX then provides nine limited exceptions to this broad rule for certain specific categories of educational institutions and conduct. None of these exceptions provides an exemption for claims of sex discrimination practiced through retaliation against a person who has complained that an educational institution is engaging in discrimination.

This Court has previously recognized that Congress, in enacting Title IX, intended to prohibit a broad range of discriminatory conduct by educational institutions. The Court has found that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language." *North Haven*, 456 U.S. at 521, quoting *United States v. Price*, 383 U.S. 787, 801 (1966). Consistent with this approach, the Court has held that Title IX prohibits sex discrimination in forms as varied as employment decisions and practices, *North Haven*, 456 U.S. at 530; sexual harassment of a student by a teacher, *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); and

sexual harassment of a student by another student, *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).[3] The Court also has held that, in order to accomplish the broad statutory purposes underlying this provision, Title IX is enforceable through an implied private right of action for damages. *Franklin*, 503 U.S. at 72-73.

The breadth of the language Congress adopted in Title IX, together with the absence of a specific exemption for claims based on retaliation, strongly support the conclusion that a person is "excluded from participation in" a federally funded program and is "subjected to discrimination" on the basis of sex when that person suffers retaliation for having complained about unlawful sex discrimination in such a program. *See North Haven*, 456 U.S. at 521-522. The Court has never recognized an exception from the substantive scope of the prohibition on sex discrimination based on the form or type of action through which the discrimination was practiced. Similarly, the Court has not previously established an exception for discrimination in formal employment actions. The decision

[3] In certain contexts, the Court has recognized a limitation on the private right of action under Title IX by requiring that, before discriminatory intent may be ascribed to the funding recipient, it must have control over both the person who takes the discriminatory act and the context in which the discrimination occurs. *See Gebser*, 524 U.S. at 284-290; *Davis*, 526 U.S. at 639-647. The concerns that led the Court to adopt that requirement would not appear to be present here. This case involves a formal decision by a school system to terminate Petitioner's employment as a coach, an official action carried out by an authorized decision maker, pursuant to established procedures. Further, as demonstrated below, the act of discrimination allegedly involved here – retaliation against a person who complains of unlawful sex discrimination – is of a type with which Congress was familiar at the time it adopted Title IX.

by the court of appeals thus represents a sharp departure from this Court's prior decisions.[4]

At the time Title IX was adopted in 1972, the Court had clearly recognized that retaliation on the basis of a complaint about racial discrimination constituted a form or type of discrimination that was prohibited under the civil rights statutes and that could be challenged through an implied private right of action. In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969), the Court held that a white man could maintain an action under 42 U.S.C. § 1982 for his expulsion from a membership corporation in retaliation for his protest against the entity's refusal to approve the assignment of a lease to a black man. The Court concluded that "[i]f that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property" and therefore could form the basis for a private right of action under that statute. 396 U.S. at 237.

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court found that in enacting Title IX, Congress had acted "against the backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX." 441 U.S. at 699 n. 22. These decisions specifically included

[4] The court of appeals erred in concluding that *Alexander v. Sandoval*, 532 U.S. 275 (2001), altered the fundamental approach for reviewing a statute to determine the scope of an implied private right of action and that, after *Sandoval*, the scope of such an implied right is defined exclusively by the language and structure of the statute. Pet. App. 19a. The scope of the implied right is of course defined by legislative intent. But it is well established that the scope of the implied right under Title IX is determined by reference to the legislative history, *North Haven*, 456 U.S. at 521-530, including importantly an evaluation of "the state of the law when the Legislature passed Title IX," *Franklin*, 503 U.S. at 71.

Sullivan, with its recognition of an implied private right of action based on retaliatory discrimination. *See id.* at 690 n.13 and 699 n. 22. *Accord Franklin*, 503 U.S. at 72.

Similarly, Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. With the substitution of the word "sex" in Title IX to replace the words "race, color, or natural origin" in Title VI, the two statutes use identical language to define the benefited class. In *Cannon*, the Court found that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."[5] 441 U.S. at 696. During that time period, an implementing regulation was adopted under Title VI that explicitly prohibited retaliation based on complaints about illegal discrimination. *See* 45 C.F.R. § 86.71 (1975), incorporating 45 C.F.R. § 80.7(e)(1975). In *Cannon*, the Court concluded that, both as a general principle and for specific reasons unique to this statute, Congress intended that Title IX would be enforced in the same manner as Title VI.

> It is always appropriate to assume that our elected representatives, like other citizens,

[5] In support of this conclusion, the Court cited three statements by Senator Bayh in floor debate over adoption of Title IX:

> "The same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]" 117 Cong. Rec. 30408 (1971) (Sen. Bayh). Accord, 118 Cong. Rec. 5807 (1972) (Sen. Bayh); id. at 18437 (1972) (Sen. Bayh) ("[E]nforcement of [Title IX] will draw heavily on these precedents" under the Civil Rights Act of 1964).

Cannon, 441 U.S. at 696 n. 19. *See id.* at 706 n. 40.

> know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

441 U.S. at 697-698.

Thus, there is every reason to conclude that when it enacted Title IX in 1972, Congress expected and intended that the broad language of the statute, prohibiting discrimination based on sex without limits on the "persons" protected by the statute or the form of "discrimination" involved (other than specific exceptions for defined types of educational institutions), included a ban on retaliation for complaints about sex discrimination. As the Court found in *Sullivan*, "reprisal discrimination must be actionable . . . in order to make meaningful the rights protected by the statute . . . ." 396 U.S. at 237. It correctly noted that, at times the only effective adversary of discrimination is someone who is not the direct target. *Id.*

II. THE LEGISLATIVE HISTORY OF TITLE IX CONFIRMS THAT RETALIATION IS PROHIBITED CONDUCT.

The Eleventh Circuit held that Petitioner could not maintain an action under Title IX for retaliatory discrimination on the principal ground that the text of the statute "makes no mention of retaliation at all." Pet. App. at 20a. It found that this silence "weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct." *Id.* However, both the court's approach to

determining Congressional intent and its conclusion are erroneous.

As this Court held in *Cannon*, the private right of action under Title IX is implied, rather than express. Therefore, the Eleventh Circuit "fundamentally misunderst[ood] the nature of the inquiry" by attempting to attribute dispositive significance to the "silence" of the statute on this point. *See Franklin*, 503 U.S. at 72. Rather, under these circumstances the Court reviews the background against which Congress acted in order to determine the contours of the right of action that it implicitly authorized.

The context in which Congress enacted Title IX in 1972 demonstrates clearly that (a) Congress intended to prohibit all forms of discrimination in federally funded educational programs, including retaliation; (b) its intent is especially clear with respect to prohibiting all forms of discrimination in employment, the context in which this lawsuit arises; and (c) Congress intended the private right of action under Title IX to extend to such retaliation claims.

1. The 1970 Hearings. Congressional consideration of sex discrimination began in earnest in 1970, six years after successful completion of a generations-long effort to adopt legislation to end forever the pernicious practice of racial discrimination. Many of the Members of the Congress that adopted Title IX, including amicus curiae, had participated in the convulsive struggle to enact civil rights legislation and subsequent efforts to oversee the implementation of these new laws.

Title IX was modeled upon prior civil rights legislation. Congress intended that its prohibition on sex discrimination would sweep at least as broadly as the prohibition on racial discrimination and would be enforced

through the same types of remedial measures as had been developed under the civil rights statutes.

The first significant legislative effort to address sex discrimination in education were hearings held in June and July 1970 by a special Subcommittee on Education of the House Committee on Education and Labor, chaired by Representative Edith Green.[6] *North Haven*, 456 U.S. at 523 n. 13. In 1,200 pages of testimony, the Subcommittee produced substantial evidence that women suffered from "massive, persistent patterns of discrimination" in all aspects of education, including admissions, scholarship programs, faculty hiring, pay, promotions and tenure. *See* 118 Cong. Rec. 5803-5804 (1972) (remarks of Senator Bayh). In particular, the hearings demonstrated that many women had suffered from retaliation by educational institutions in response to their objections to discriminatory practices.[7]

The hearings also demonstrated that the federal civil rights statutes did not contain effective measures to prevent and redress sex discrimination. For example, they showed that Title VI of the Civil Rights Act prohibited racial discrimination by all recipients of federal funding but did not

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[6] "Discrimination Against Women," Hearings before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970).

[7] Prior briefs submitted by Petitioner and the United States have quoted passages from the testimony or statements before the Subcommittee of Dr. Ann Harris, Dr. Bernice Sandler, Daisy Fields, and the Women's Rights Commission of New York University Law School that describe how women had experienced retaliatory discrimination in employment due to their efforts to fight sex discrimination at educational institutions. Petition at 17-18; Brief for the United States as Amicus Curiae in support of the Petition at 8 n.1. *See* 118 Cong. Rec. 5810, 5812 (reprinting article by Dr. Bernice Sandler "The Status of Women: Employment and Admissions")("I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such [sex] discrimination.")

extend to sex discrimination. Section 601, 78 Stat. 241, 252, codified at 42 U.S.C. § 2000d. Further, Title VII prohibited sex discrimination in employment but did not extend to educational institutions. Section 703, 78 Stat. at 255, codified at 42 U.S.C. § 2000e-2.

2. Contemporaneous Consideration of the Equal Rights Amendment. The Congressional effort to adopt a law containing a sector-specific prohibition against sex discrimination in education overlapped with a broader legislative effort to address the general issue of gender discrimination. In May 1970, the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, chaired by Senator Bayh, held three days of hearings on the proposed Equal Rights Amendment. As with the efforts to address sex discrimination in education specifically, the proponents of the constitutional amendment cast their arguments for adoption as an extension of the recent, successful struggle to adopt legislation prohibiting racial discrimination. Representative Shirley Chisholm crystallized the issue in her Subcommittee testimony:

> I have been far oftener discriminated against because I am a woman than because I am black.

See 118 Cong. Rec. 8900 (as quoted by Senator Bayh).

The proposed Equal Rights Amendment was adopted by the House in 1970 and was debated, but not passed, by the Senate. Thus, when the Ninety-Second Congress convened in 1971, its agenda included unfinished work on several proposed responses to sex discrimination.

3. Initial Consideration of Title IX in 1971. The provision that ultimately became Title IX was first offered by

Senator Bayh on August 5, 1971, as a floor amendment to the Higher Education Act of 1971. 117 Cong. Rec. 30155. *See North Haven*, 456 U.S. at 523 n. 13. The bill reported by the Senate Committee on Labor and Public Welfare did not contain an anti-discrimination provision. *See* S. Rep. No. 92-346, 92nd Cong., 1st Sess. (1971). As the Court has previously found, because Title IX's key provisions:

> originated as a floor amendment, no committee report discusses the provisions; Senator Bayh's statements –which were made on the same day the amendment was passed, and some of which were prepared rather than spontaneous remarks – are the only authoritative indications of the congressional intent regarding the scope of § § 901 and 902.

Id. at 527.

On August 6, 1971, the Senate debated Senator Bayh's sector-specific amendment to prohibit sex discrimination in education. On the same day, he attempted to place the Equal Rights Amendment directly on the Senate Calendar for debate. *See* 117 Cong. Rec. 30213-30215 (August 6, 1971).

The Bayh Amendment proposed to prohibit recipients of federal funds from discriminating against women in education programs. Senator Bayh characterized his amendment as a "narrower embodiment of that principle [equality]" that was before the Senate in the Equal Rights Amendment. 117 Cong. Rec. at 30414.

The Bayh Amendment was intended to "insure that no American will be denied access to higher education because of race, color, religion, national origin, or sex." *Id.* at 30403.

Senator Bayh stated "that the evidence of sex discrimination is truly appalling" but that there was a gap in the civil rights laws, because "[t]he antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination" by educational institutions. *Id.* He noted that "this [the language of his amendment] is identical language specifically taken from title VI of the 1964 Civil Rights Act." *Id.* at 30407. He stated that "the same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act and the regulations thereunder would be equally applicable to discrimination [prohibited by the amendment]." *Id.* at 30408. *See Cannon*, 441 U.S. at 696 n. 19.

The Higher Education Act was considered under a unanimous consent agreement which required that all amendments must be germane to provisions in the measure as reported by Committee. The Bayh Amendment ultimately was ruled non-germane and never came to a floor vote in that Session of Congress. *Id.* at 30415. However, the debate on the Amendment paved the way for further legislative action in 1972, when Congress resumed consideration of the bill. In the interim, on October 12, 1971, the House again approved the Equal Rights Amendment.

4. Adoption of Title IX in 1972. On February 7, 1972, the Senate Committee on Labor and Public Welfare reported a new version of the Education Act. As with the 1971 version, this bill did not contain a prohibition against sex discrimination in education. *See* S. Rep. No. 92-604, 92nd Cong., 2d Sess. (1972). Senator Bayh again introduced an amendment to prohibit sex discrimination in federally funded education programs. This measure was substantially similar to the amendment that he had proposed in 1971. *North Haven*, 456 U.S. at 524.

During the floor debate, Senator Bayh stated that his Amendment "is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs." 118 Cong. Rec. at 5803 (emphasis added).

> The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions – and appropriate safeguards – parallel to those found in title VI of the 1964 Civil Rights Act.

Id. 118 Cong. Rec. 5812 (1972). His provision was explicitly intended to prevent discrimination on the basis of sex in the same manner that discrimination already was prohibited on the basis of race, religion or national origin; and to make sex discrimination subject to the same enforcement mechanisms that Congress had adopted to redress these other forms of discrimination.

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI. . . . The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

Id. at 5807, quoted in *Cannon*, 441 U.S. at 696 n. 19. He further explained:

> We are dealing with discrimination in admissions to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.
>
> In the area of employment, we permit no exceptions.

Id. at 5812 (emphasis added).

The Senate adopted the Bayh Amendment by voice vote on February 28, 1972. *Id.*, at 5815. On March 22nd, the Senate adopted the Equal Rights Amendment. *Id.* at 9598. An important part of the case for adoption of the proposed Amendment was the evidence of discrimination against women in education that had been compiled in the course of consideration of Title IX. *Id.* at 8901 (remarks of Senator Bayh).

In the Conference Committee on the Higher Education Act, the House and the Senate agreed to include the anti-discrimination measure now known as Title IX.[8] The Conference measure was adopted by both Houses and signed by the President on June 23, 1972.

As adopted, Title IX contained a sector-specific prohibition on sex discrimination in federally funded

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[8] *See* S. Conf. Rep. No. 92-798, 92nd Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.A.A.N. at 2671-2672.

education programs. Congress intended: (1) to extend the existing Civil Rights laws to apply generally to education, with limited exceptions that apply to specifically defined categories of institutions and conduct;[9] (2) to prohibit discrimination in employment in covered educational institutions; and (3) to have Title IX be applied and enforced in a manner parallel to Title VI of the Civil Rights Act.

5. Congressional Consideration of the Title IX Implementing Regulations. In 1975, Congress held several hearings to determine whether to disapprove the implementing regulations for Title IX adopted by the then Department of Health, Education and Welfare. On several occasions, the Court has relied upon the unique post-enactment history of the statute to confirm its understanding of Congressional intent concerning the scope and purpose of Title IX. *See e.g., North Haven*, 456 U.S. at 535. This legislative history provides further support for the proposition that in adopting an implementing regulation that prohibited retaliatory discrimination for complaints about sex discrimination, HEW correctly ascertained the legislative intent. *See North Haven*, 456 U.S. at 535; *Cannon*, 441 U.S. at 687.

The implementing rules incorporated a provision of the existing Title VI regulations that prohibited retaliation in

[9] As originally adopted, Title IX contained five exceptions that applied to specific categories of educational institutions with unique missions. These exceptions applied to admissions to certain types of educational institutions (Section 901(a)(1)-(2) and (5)); and categorical exemptions for certain types of educational institutions controlled by religious organizations and that train individuals for military service (Section 901(a)(3)-(4)). These provisions contained no exceptions for discrimination in employment in covered institutions. Further, the amendments to Section 901(a) adopted since 1972 have not provided an exception that would exempt discrimination in employment.

federally funded programs. 45 C.F.R. § 86.71 (1975), incorporating 45 C.F.R. § 80.7(e)(1975).[10] It provided:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

45 C.F.R. § 86.71. Senator Bayh testified on the implementing regulations before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor. He stated that Congress, in enacting Title IX, had intended that its enforcement mechanisms would be modeled on those of Title VI.[11]

After extensive review, Congress did not prevent the Title IX implementing regulations from taking effect. While not dispositive, this history provides further support for the conclusion that in prohibiting retaliation in employment against a person who has complained about sex discrimination in a federally funded education program, HEW had properly implemented the intent of Congress.

[10] The current counterparts of these rules are 34 C.F.R. § 106.71 (Title VI) and 34 C.F.R. § 100.7(e) (Title IX).

[11] "Sex Discrimination Regulations", Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided by Title VI"); *see id.* at 174, 183.

6. Conclusions Concerning the Intent of Congress. The legislative history of Title IX confirms the conclusion that emerges from a review of the text of the statute: that Congress intended Title IX to sweep broadly to preclude sex discrimination in education, including in employment decisions; and that the scope of that prohibition includes discrimination in employment through retaliation. Congress intended that Title IX would be enforced through remedies similar to those that had been developed in the implementation of the civil rights statutes, which included a prohibition on retaliation. Nothing in the legislative history suggests that Congress intended to exempt from coverage one type of sex discrimination – retaliation – especially retaliation in employment, the context in which this lawsuit arises.

The Court properly concluded in *Cannon* that Congress adopted Title IX in 1972 with the intention that the private right of action under this provision would have at least the same scope as the enforcement action under the civil rights statutes, which already had been held in *Sullivan* to encompass a claim based on discrimination through retaliation.

III. THE PROHIBITION OF DISCRIMINATION THROUGH RETALIATION IS NECESSARY TO INSURE EFFECTIVE ENFORCEMENT OF TITLE IX.

In the thirty years since the adoption of Title IX, there has been a remarkable evolution of increased participation and expectations for girls and women in the classrooms and on the playing fields of America's high schools, colleges, and universities. Old stereotypes have crumbled, often begrudgingly. Today the benefits of Title IX can be observed in subsequent generations of female

faculty members, school administrators, doctors, lawyers, business and corporate leaders.

Title IX has had the most profound impact on the lives of women in academia. Prior to 1972, women students and faculty were routinely barred from study in certain disciplines otherwise open to men. Other disciplines imposed quotas upon women. Some institutions of higher learning were simply closed to female students and faculty. Since the passage of Title IX, progress in the academic area has been steady, quiet and profound. Today more than 53% of college and university students are women. The representation of women on faculties has increased from 18% to 37%.

However, much remains to be done. Women graduates and faculty remain concentrated in what are typically regarded as "female fields" with lower incomes, such as teaching and nursing. Female students and faculty are significantly underrepresented in certain sciences, engineering, and high-tech disciplines.[12] Tenure tracks for faculty continue to be weighted in favor of men, and women have fewer opportunities in administrative positions on our campuses.

Since the enactment of Title IX, women athletes have made stunning progress in our schools, colleges and universities. In the ensuing 30 years, the percentage of women participating in school athletic programs has risen from 10% to 41%. The number of women participating in college athletics has risen from 32,000 to 160,000. In the sector involved in this lawsuit, the number of high school

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[12] "Title IX at 30: Report Card on Gender Equity," Report of the National Coalition for Women and Girls in Education at 11-12 (June 2002) ("Report Card"), available at www.ncwge.org/title9at30-6-11.pdf.

girls participating in sports has risen from 300,000 to 2.78 million, an eight-fold increase.[13] The dramatic increase of girls in high school athletics will in turn enable further growth in college-level participation. Our daughters, like our sons, will expect the opportunity to participate on our college and university athletic teams. There will be no lack of interest.

As a result of this dramatic increase in participation in sports at educational institutions, girls and young women now enjoy, along with their male peers, the attendant benefits of better health, self-esteem, academic performance, and development of leadership skills. Since girls have been allowed to participate equitably in academics and sports, they have experienced a decrease in drug use, smoking, teen pregnancy and drop-out rates.[14] In addition, the opportunity to participate in athletics has had a profound impact on the ability of young women to succeed after they have graduated. It is no accident that in a recent poll of female CEOs, 80% stressed the importance of their participation in athletics.[15]

As never before, Title IX has made it possible for girls and women to receive and compete for critical scholarship dollars, as their male peers have always enjoyed. Today, college women are headlining our sports pages and television, as in the women's NCAA basketball championship. Most importantly, through sports participation many young women now are able to obtain a college education, which previously was out of their reach. Thanks to the progress Title IX has produced in college athletics, women have made great strides in professional sports. Women

[13] Report Card at 14-16.
[14] Report Card at 14.
[15] *See* "From the Locker Room to the Board Room: A Survey on Sports in the Lives of Women Business Executives", available at www.massmutual.com/mmfg/about/gameface/boardroom.html

athletes have established the Women's National Basketball Association, the Women's United Soccer Association, and participate on teams within the United States Soccer Federation. American women have won the World Cup in soccer and unprecedented numbers of Olympic medals.

Despite this progress, women athletes still lag behind their male counterparts. For example, the statistics for NCAA Division I schools are as follows:

- 53% of the student population are women
- 41% of the athletes are women
- 32% of recruiting dollars are spent on female athletes
- 36% of overall athletic budgets are utilized for women's programs
- Schools spend $2 on men's sports for every $1 they spend on women's sports.[16]

In sum, more needs to be done to achieve the mandate of Title IX for non-discrimination in athletics. The principle of non-discrimination requires a more equitable allocation of resources than is now occurring. This inequality of resources is precisely the concern expressed by the Petitioner for which he allegedly was terminated as a coach.

There is a direct relationship between the prohibition against sex discrimination in education prescribed by Title IX and the enforcement issue presented by this lawsuit.

[16] *See* Report Card at 16.

Continued progress toward equality in athletic participation at the collegiate level depends upon a concerted effort to insure equal opportunity for young women athletes at the high school level.

School administrators, teachers, athletic directors and coaches are key components in the implementation of Title IX. There are insufficient regulators to detect and remedy discrimination in every high school in the country. Compliance requires a good faith effort on the part of all federally funded institutions and their adult leadership. When local school officials refuse to comply with Title IX, it is important that a high school coach like the Petitioner be able to complain within the school system about a possible discriminatory act and not suffer retaliation for having had the courage to object.

In a practical sense, the Petitioner in this case is a "private attorney general." A decision upholding his right to be free of discrimination in employment for trying to vindicate the right established by Congress will send a strong message to other persons throughout the country who believe that they have witnessed discrimination in education programs and to the school systems that employ them.

The Congress that adopted Title IX was determined to eradicate discrimination on the basis of sex in federally funded educational programs. Congress chose not to set forth a panoply of specific prohibitions and remedies that could be utilized in their enforcement, because it would have been impossible to anticipate every conceivable situation in which the statute might apply. Rather, Congress chose to adopt sweeping language that prohibited all forms of discrimination, with narrow, specific exceptions. Congress adopted this approach to convey its intention in the most direct terms possible, by incorporating the prohibition

against sex discrimination within the overall framework and enforcement mechanisms established under the civil rights statutes. Title IX was patterned after Title VI of the Civil Rights Act of 1964, with the intent that federal courts would apply the same broad enforcement mechanisms for Title IX that had already been recognized and applied under the statute that prohibited racial discrimination. *See Cannon*, 441 U.S. at 699; *Sullivan*, 396 U.S. at 237. Retaliatory discrimination in education was abhorrent to those who enacted Title IX.

Accordingly, the Court should reverse the lower court's decision and hold that the Title IX prohibits discrimination through retaliation.

CONCLUSION

For the reasons set forth above, Amicus curiae respectfully submits that the judgment below should be reversed.

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No. 02-1672

IN THE
Supreme Court of the United States

RODERICK JACKSON,

PETITIONER,

v.

BIRMINGHAM BOARD OF EDUCATION,

RESPONDENT.

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF COLLEGE SPORTS COUNCIL IN SUPPORT OF NEITHER PARTY

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae College Sports Council ("CSC"), a nonprofit corporation headquartered in Washington, D.C., is an umbrella organization that promotes the preservation and expansion of educational ideals, athletics, and the interests of those who sponsor, participate in, or attend such athletics. Through its institutional and individual members, CSC represents tens of thousands of student-athletes, coaches, coaching associations, booster groups, alumni, and schools nationwide.

This litigation raises important questions for CSC's members and for CSC's mission: not only whether the law should protect coaches and other educators who champion the rights of the students in their charge, but also whether litigation is the best, or at least the first, way to resolve disputes.

ISSUE PRESENTED

This case poses one purely legal issue: does Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), impliedly create a private right of action under which an educator can challenge retaliatory actions

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amicus curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court.

taken by a federally funded school for his or her advocacy about perceived gender discrimination against students?

SUMMARY OF ARGUMENT

> It is a worthy thing to fight for one's freedom; it is another sight finer to fight for another man's.
>
> Mark Twain[2]

At the motion-to-dismiss phase, courts and parties alike must assume that Coach Jackson advocated for his team for the best of reasons and in the most unobjectionable of ways. The nobility of his pre-litigation actions, however, does not guarantee the justiciability of his retaliation claim. Moreover, by initiating litigation without first filing an administrative complaint, Coach Jackson materially altered the terms to which the Birmingham Board of Education ("Birmingham") agreed when it accepted federal funds. Although coaches (like educators generally) need protection from unwarranted retaliation, schools need protection from unwarranted and premature litigation.

Patterned on Title VI of the Civil Rights Act of 1964, Title IX broadly provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

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[2] Albert Bigelow Paine, ed., *Letters Vol. 4: Mark Twain's Letters 1886-1900*, at 93 (2003) (letter to Rev. J. H. Twichell, Hartford, Conn. (June 17, 1898)).

In applying this text to the retaliation regulation at issue here, *amicus curiae* CSC makes three arguments:

1. Absent the retaliation regulation, a plaintiff could not credibly argue that Title IX prohibits retaliation for advocacy on behalf of a third party's statutory or regulatory rights.

2. When a plaintiff relies upon a regulation to establish a violation, that regulation must "effectuate" Title IX's statutory prohibition against intentional gender-based discrimination before it will support a private right of action.

3. Even if a regulation so effectuates Title IX, however, third-party beneficiaries cannot enforce Spending-Clause legislation like Title IX unless they comply with the *entire* regulatory process that creates the regulatory prohibition that they seek to enforce.

Under the foregoing framework, *some* hypothetical plaintiff could bring a private right of action to enforce the regulatory provision against retaliation. As detailed below, the application of the second argument to this case presents a compounded series of close questions. At any rate, unless he initiated the required administrative process, Coach Jackson cannot bring a private right of action for retaliation under Title IX.

FACUTAL AND LEGAL BACKGROUND

Amicus curiae CSC adopts the facts presented in the Eleventh Circuit's decision, 309 F.3d at 1335-36, but highlights here only that – although ¶ 2 of the Amended Complaint alleges fulfillment of all conditions precedent to

his filing suit – it appears that Coach Jackson did not file an administrative complaint, that no responsible U.S. Department of Education ("DE") official has determined that Birmingham's compliance could not be secured by voluntary means, and that Birmingham did not receive the requisite pre-litigation notice of its failure to comply and the action to be taken to effect compliance. *Cf.* 45 C.F.R. § 80.8(a), (d) (regulatory preconditions to effect compliance "by any other means authorized by law"); 34 C.F.R. § 100.8(a), (d) (same).

Congress enacted Title IX (and related civil rights statutes such as Title VI that place anti-discrimination conditions on federal funds) under the Spending Clause. *See Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (*citing* cases). By contrast, Congress enacted Title VII under the Commerce Clause and § 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 458 (1976) (Brennan, J., concurring) (citing cases).

Unlike Title VI and IX, Title VII expressly prohibits retaliation. 42 U.S.C. § 2000e-3(a). Nonetheless, both Title VI and Title IX authorize federal funding agencies to issues rules, regulations, and orders of general applicability "to effectuate" their respective statutory prohibitions against intentional discrimination. 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682. Under both Title VI and Title IX, such rules, regulations, and orders do not take effect unless and until approved by the President, 42 U.S.C. § 2000d-1; 20 U.S.C. § 1682, with presidential approval manifested by a signature in the *Federal Register. See* 110 Cong. Rec. 2499 (1964) (Rep. Lindsay). Executive Order 12,250 delegated the President's rule-approval and enforcement authority to the Attorney General, 45 Fed. Reg. 72,995 (1980), who in turn delegated the enforcement authority, but not the rule-

approval authority, to the Assistant Attorney General in charge of the Department of Justice's Civil Rights Division. 46 Fed. Reg. 29,704 (1981) (*codified at* 28 C.F.R. § 0.51(a)).

Consistent with this Title VI heritage, the initial Title IX regulations by the Department of Health, Education & Welfare ("HEW") incorporate HEW's Title VI regulations, which prohibit recipients' retaliating for two types of actions: (a) interference with a *statutory* right or privilege, and (b) participation in a *regulatory* investigation, proceeding, or hearing. 40 Fed. Reg. 24,128, 24,144 (1975) (*codified at* 45 C.F.R. § 86.71); 29 Fed. Reg. 16,299, 16,301 (1964) (*codified at* 45 C.F.R. § 80.7(e)). Upon its formation as a separate agency, the Department of Education ("DE") promulgated in Title 34 of the Code of Federal Regulations the education-related provisions of the HEW regulations. 45 Fed. Reg. 30,802 (1980) (invoking the 5 U.S.C. § 553(b)(B) "good-cause" exemption not to undertake notice-and-comment rulemaking for its repackaging the HEW regulations as its own).

Both the former HEW regulations and the new DE regulations continue to include the relevant provisions. 45 C.F.R. §§ 80.7(e), 86.71 (2003); 34 C.F.R. §§ 100.7(e), 106.71 (2003). In addition, in 2000, twenty-one federal agencies (including the Department of Justice) issued Title IX regulations that include similar provisions. *See* 65 Fed. Reg. 52,858 (2000). Presidents Johnson and Ford signed the HEW regulations. 29 Fed. Reg. at 16,303; 40 Fed. Reg. at 24,137. President Carter did not sign the DE regulations. 45 Fed. Reg. at 30,803. With the exception of the Department of Justice's regulations in 2000, 65 Fed. Reg. at 52,880, no Attorney General has signed Title IX regulations.

ARGUMENT

I. *WITHOUT THE REGULATIONS,* THERE IS NO PRIVATE RIGHT AGAINST RETALIATION

If Birmingham's alleged retaliation violated Section 901(a), then Coach Jackson has an implied private right of action, without exhausting his administrative remedies. *See Cannon v. University of Chicago,* 441 U.S. 677, 689 (1979). The first task, therefore, is to define the scope of Title IX's statutory prohibition and to determine whether retaliation falls within that scope.

Whatever the *regulatory* requirements imposed on recipients, Title IX's *statutory* prohibition clearly covers only intentional, gender-based discrimination. *See Alexander v. Sandoval,* 532 U.S. 275, 282 & n.2 (2001) ("it is absurd to think that *Cannon* meant, without discussion, to ban under Title IX the very disparate-impact discrimination that *Bakke* said Title VI permitted"); *Cannon,* 441 U.S. at 748 n.19 (Powell, J., dissenting) (Title IX's limitation to intentional discrimination "seems forgone" in light of the *Bakke* holding on Title VI). As borne out by its reliance on the Title VI template,[3] Title IX proscribes the same intentional (*i.e.,* purposeful) discrimination that Title VI and the Equal Protection Clause prohibit, *United States v. Fordice,* 505 U.S. 717, 732 n.7 (1992) (protection is coextensive with that of the Fourteenth Amendment), namely where "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (footnote and citations omitted, emphasis added); *cf.* Catharine A. MacKinnon, "Disputing Male Sovereignty: On United States v. Morrison," 114 HARV. L. REV. 135, 149-50 & n.85 (2000) (for "constitutional sex equality oversight," Supreme Court requires that "discrimination under the Fourteenth Amendment be intentional").

When it enacted the Civil Rights Act of 1964 (*i.e.,* Titles VI and VII), Congress expressly included retaliation only in Title VII. 42 U.S.C. § 2000e-3(a). Standing alone, such selective omissions and insertions within the same statute suggest that Congress intentionally and purposefully omitted retaliation protections from Title VI. *Russello v. United States,* 464 U.S. 16, 23 (1983). Significantly, although it generally patterned Title IX on Title VI, Congress borrowed one provision – unrelated to the issues before the Court – from Title VII. *Compare* 42 U.S.C. § 2000e-2(j) (Title VII) *with* 20 U.S.C. § 1681(b) (Title IX). If there was any doubt, Congress clearly knew how to include Title VII provisions in Title IX when it intended to do so.

In *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969), decided between the enactment of Title VI and Title IX, this Court allowed a Caucasian landlord to maintain a suit against a private park-management corporation that retaliated against him and discriminated against his African-American lessee. 396 U.S. at 236-37. In doing so, the Court interpreted a different statute, 42 U.S.C. § 1982, which Congress enacted under different authority that Title IX, the power to enforce the Thirteenth Amendment. *See Jones v.*

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[3] *Compare* 20 U.S.C. § 1681(a) *with* 42 U.S.C. § 2000d; *see North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 529 (1982) (interpret Title IX in *para materia* with parallel provisions of Title VI).

Alfred H. Mayer Co., 392 U.S. 409, 413 & n.5 (1968). Significantly, courts most frequently cite *Little Hunting Park* as a third-party standing case, in which the landlord has standing to assert the equal-protection rights of his lessee. *See, e.g., Craig v. Boren*, 429 U.S. 190, 195 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263-64 (1977). While important, this principle does not support of free-standing protection from retaliation, whether or not the direct victim supports its advocate's advocacy. *Cf.* 45 C.F.R. § 81.12 ("Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity"); 34 C.F.R. § 101.12 (same).

The authorities that counsel for interpreting Title IX to include third-party advocacy protections involve other statutory schemes, adopted without the Spending Clause's need for unambiguous congressional notice to the federal recipient of the terms of its bargain with the federal government. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Further, although those cases construe statutes under Congress' more generous remedial powers (*e.g.*, the Equal Protection Clause, the Thirteenth Amendment), they are at bottom cases of statutory construction. Each lacks the clear *Russello* inference that the Civil Rights Act of 1964 provides: namely, Title VII has a retaliation provision, and Title VI does not. By choosing a Title VI template for Title IX, Congress thus omitted statutory retaliation protections. Given this basic statutory difference, Coach Jackson cannot argue that Congress would have expected the Court to interpret Title IX in light of *Little Hunting Park*. *See*

Sandoval, 532 U.S. at 288 (rejecting such the "contemporary legal context" argument).[4]

In its *amicus curiae* brief support of Coach Jackson's petition for *certiorari* (hereinafter "U.S. Br."), *amicus curiae* United States cites testimony from 1970 hearings on the prevalence of retaliation against women in academia. *See* U.S. Br. at 8-9 n.1. Although the hearings chronicle significant wrongs, they do not approach the retaliation against African Americans in the period leading up to the enactment of the Civil Rights Act of 1964. *See* Diane McWhorter, *Carry Me Home: Birmingham, Alabama - The Climactic Battle of the Civil Rights Revolution, passim* (2002). If, on that record, Congress could omit retaliation protections from Title VI of the Civil Rights Act of 1964, it certainly could omit them from Title IX of the Education Amendments of 1972.

For all the foregoing reasons, CSC submits that – if no Title IX regulations existed – a would-be plaintiff could not

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[4] In a somewhat oblique way, this Court already has concluded that retaliation protections are not the same right as the underlying equal-protection right. *See Great American Federal Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 387-88 (1979) ("Clearly [the] right under § 704(a) – to be free from retaliation for efforts to aid others asserting Title VII rights –is distinct from the Title VII right [of] employees not to be discriminated against on the basis of their sex") (White, J. dissenting). Writing for himself and Justices Brennan and Marshall, Justice White dissented from the majority's resolution of the question there presented: namely, the availability of relief under 42 U.S.C. § 1985(3). 442 U.S. at 385-86. Had it considered the plaintiff-advocate to have a right under Title VII, presumably the majority would not have ruled for the defendant.

credibly assert an implied private right of action against a federal recipient to protect his or her advocacy on behalf of third parties.

II. *IF THEY FOLLOW THE REGULATIONS,* EDUCATORS *MAY* HAVE A PRIVATE RIGHT

As this Court recognized in *Sandoval,* substantive agency regulations fall into two categories: (1) those that authoritatively construe statutory terms (and thus *statutory* rights), and (2) those that extend to conduct that the underlying statute does not reach. The first category is as privately actionable as the underlying statute, 532 U.S. at 284 ("Such regulations, if valid and reasonable, authoritatively construe the statute itself[,] and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute"), but the second category cannot support a private action at all. 532 U.S. at 291 ("Agencies may play the sorcerer's apprentice but not the sorcerer himself"). If the retaliation regulation is valid, applies by its terms to the facts here, and falls into the first category, the Court should remand for further proceedings. If, however, the regulation falls into the second category, the Court should affirm the dismissal.

This section undertakes to classify the retaliation regulation into the appropriate one of those two categories. Assuming *arguendo* both that the Court concurs with CSC that the statute lacks a private retaliation action *in the absence of a regulation* (Section I, *supra*) and that the Court will not overrule *Sandoval,* this classification exercise represents the primary question raised by this litigation to date. Before classifying the retaliation regulation, however, CSC first must analyze the judicial deference owed to it.

A. Title IX Regulations Warrant *Skidmore* – Not *Chevron* – Deference

In its brief in support of *certiorari, amicus curiae* United States posits that DE's regulations warrant deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). U.S. Br. at 10. Because the weaker deference under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), should apply, *amicus curiae* CSC analyzes the deference appropriate to DE's (or any other agency's) Title IX regulations, rules, or orders of general applicability.

Under the separation-of-powers principles that underlie *Chevron,* courts owe deference to an agency's construction of a statutory scheme that Congress charged the agency to administer. *Chevron,* 467 U.S. at 843-44, 865-66. Indeed, under such a grant of authority, an agency's regulation issued to fill a statutory gap is binding on the courts, unless procedurally defective, arbitrary and capricious in substance, or manifestly contrary to the statute. *Chevron,* 467 U.S. at 844. Consistent with this underlying principle, this Court routinely has deferred to agencies acting within the permissible scope of delegated authority in both the civil rights[5] and general administrative[6] contexts.

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[5] In *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205, 210 (1972), the Court accorded "great weight" to a "consistent administrative construction" of the Civil Rights Act of 1968, in which Congress delegated "authority and responsibility for administering this Act [to]the Secretary of Housing and Urban Development." 42 U.S.C. § 3608(a). Similarly, the Supreme Court held that guidelines issued by the Equal Employment Opportunity Commission ("EEOC") were entitled to great deference, *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34

(Footnote cont'd on next page)

By contrast, in the absence of delegated authority justifying *Chevron* deference, an agency regulation lacks the force and effect of law to bind the courts, and instead receives only the deference warranted by:

> the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.

United States v. Mead Corp., 533 U.S. 218, 227-28 (2001) (*quoting Skidmore*, 323 U.S. at 140); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (same). While the retaliation regulation

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(Footnote cont'd from previous page.)

(1971), in a context in which Congress delegated enforcement authority and rulemaking authority *specifically to EEOC*. *See* 42 U.S.C. §§ 2000e-5, 2000e-12. In *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280-81 (1969), the Court indicated that it would sustain the Secretary of Housing and Urban Development's interpretation if "reasonably related to the purposes of the [United States Housing Act]," in which Congress authorized the Secretary to "make, amend, and rescind such rules and regulations [necessary to] carry out the provisions of this Act." Pub. L. No. 93-383, Title II, § 8; 50 Stat. 653, 891 (1937) (*recodified* at 44 U.S.C. § 3535(d)).

[6] In *Udall v. Tallman*, 380 U.S. 1, 17 (1965), the Court deferred to an agency order issued under an Executive Order that the President had delegated to the agency to implement and revise. *See also Mourning v. Family Publication Services, Inc.*, 411 U.S. 356, 369 (1973), in which the Court deferred to the Federal Reserve Board's interpretation of the Truth in Lending Act, in which Congress authorized the Board to "prescribe regulations to carry out the purposes of this subchapter." 15 U.S.C. § 1604(a).

represent a consistent position since 1964, HEW appears to have simply inserted its Title VI provision into its Title IX program, without considering the First Amendment issues raised by Title IX. As discussed in Section II.B, *infra*, however, these factors counsel against deference.

1. Education Amendments of 1972

At the outset, because Title IX merely implements the constitutional standard against intentional discrimination, this Court has no reason to defer to an agency's expertise. With education protected by the First Amendment, *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003), and traditionally regulated by the states and localities, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), this Court should require either a clear constitutional violation or unambiguous congressional statement before ratifying an agency's encroaching into a school's otherwise constitutional prerogatives. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (clear congressional statement required to upset the state-federal balance in areas of traditional state or local control).[7]

As explained below, moreover, Congress expressly and intentionally provided not HEW but *each agency* the

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[7] *See also N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-500 (1979); *Bowen v. American Hospital Association*, 476 U.S. 610, 643-44 (1986) (plurality) ("Congress therefore 'will not be deemed to have significantly changed the federal-state balance" – *or to have authorized its delegates to do so* – 'unless otherwise the purpose of the Act would be defeated') (citations omitted, emphasis added); *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543-44 (2002).

authority to issue Title IX rules, regulations, and orders, 20 U.S.C. § 1682, and such multi-agency delegations trigger the weaker *Skidmore* deference. *Bragdon v. Abbott*, 524 U.S. at 642; *Mead Corp.*, 533 U.S. at 227-28; *Bowen v. American Hospital Association*, 476 U.S. at 643 n.30; Moreover, with regulatory authority only to effectuate the intentional-discrimination provisions of 20 U.S.C. § 1681(a), Title IX has nothing like the Clean Air Act's broad delegation in *Chevron*. *Compare* 20 U.S.C. § 1682 (authorizing agencies to issue regulations to effectuate the intentional-discrimination standard of § 1681(a)) *with* 42 U.S.C. § 7601(a)(1) ("The Administrator [of the Environmental Protection Agency] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter").

Finally, the legislative path through which Congress arrived at Title IX's regulatory delegation further demonstrates that Congress did not delegate special interpretative authority to HEW. Senator Bayh's 1971 proposed amendment (which did not pass) explicitly delegated rulemaking authority only to the Secretary of HEW. 117 Cong. Rec. 30,399, 30,404 (1971) (Amendment 398); *accord* at *id.* at 30,407 (Sen. Bayh). Senator Bayh's 1972 amendment (which passed and became Title IX) delegates rulemaking authority to *all* federal agencies that dispense federal funds. 118 Cong. Reg. 5803 (1972) (Amendment 874) "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted). Because Congress purposefully replaced the

Secretary of HEW with "each agency," Title IX clearly did not grant any special authority to HEW.

2. Education Amendments of 1974

During the Senate's consideration of the Education Amendments of 1974, Senator Tower introduced an amendment to exempt revenue-producing intercollegiate athletics from Section 901(a) and to require the Commissioner of Education to publish proposed Title IX regulations within 30 days. 120 Cong. Rec. 15,322-23 (1974) (Amendment 1343). In doing so, he stated that his review of the legislative history indicated that Title IX did not extend to athletics, but offered his amendment merely to clarify that – if a court found Title IX to apply to athletics – it would not apply to revenue-producing sports. *Id.* at 15,323. He further stated that, the requirement that the Commissioner publish proposed rules was "not intended to confer on HEW any authority it does not already have under the act." *Id.*

The Conference Committee amended the "Tower Amendment" – in the process, rechristening it the "Javits Amendment"[8] – to amend the athletics provision and to require the HEW Secretary (in place of the Commissioner of Education) to publish the proposed regulations. *Compare* H.R. 69, § 536 (Tower Amendment), *reprinted in* 120 Cong. Reg. 15,444, 15,477 (1974) *with* Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (Javits Amendment). The Conference Report indicates that the conference substitute

[8] *See* 40 Fed. Reg. 24,128, 24,134 (1975) (referring to the conference amendment the "Javits Amendment").

adopts the Senate's rulemaking provision, but modifies the athletics provision.[9] Conf. Rep. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4206, 4271. The Conference Committee gave no indication that it made any other changes. *Id.*

Because it is axiomatic that an agency has no authority beyond that expressly delegated to it, *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988), and that judicial deference applies only when the agency acts within the scope of its delegation, *Chevron*, 467 U.S. at 865, the Javits Amendment provides no justification for deference. First, the Javits Amendment directs the Secretary of HEW to issue not a *final* rule, but merely a *proposed* rule, which as such commands no deference.[10] Second, assuming *arguendo* that it confers authority, the Javits Amendment confers only the one-time authority to issue a proposed rule within 30 days of the enactment of the Education Amendments of 1974. As such, courts would owe any deference only to HEW's 1974 proposal, not to HEW's 1975 final rule or to any agencies'

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[9] Specifically, the Javits Amendment replaced the exemption for revenue-producing sports with a requirement that the proposed regulations "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. No. 93-380, § 844, 88 Stat. at 612.

[10] *See, e.g., Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, Food & Drug Administration*, 740 F.2d 21, 32-33 (D.C.Cir.1984)) (proposed rules does not warrant deference); *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 973 (5th Cir. 1994) ("inappropriate to defer to proposed regulations"); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10th Cir.2000) (non-final agency policies not entitled to *Chevron* deference).

subsequent actions, proposed or final. Unlike the congressional delegation of legislative authority to an executive agency under *Chevron*, such temporary, special-circumstance delegations do not elevate the delegate. *Cf. United States v. Eaton*, 169 U.S. 331, 343 (1898) ("Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions he is not thereby transformed into the superior and permanent official").

In short, the Javits Amendment is nothing like the broad delegation of rulemaking authority at issue in *Chevron*. To the contrary, far from granting new authority, the Javits Amendment merely prods a recalcitrant agency to carry out the first step of a rulemaking process that Title IX already authorized and *directed* HEW (and every other agency) to take. *See* 20 U.S.C. § 1682.

3. Congressional Acquiescence

When HEW issued the initial Title IX regulations in 1975, it submitted them to Congress pursuant to the "laying before" process of the General Education Provisions Act, 20 U.S.C. § 1232, then in effect. *See North Haven*, 456 U.S. at 533-34. Notwithstanding the general unreliability of post-enactment legislative history and congressional inaction, *e.g., Brown v. Gardner*, 513 U.S. 115, 121 (1994) (Congressional inaction frequently results from *inter alia* "paralysis"), when this Court subsequently upheld the Title IX employment regulations, it found Congress' passive acquiescence to bolster the view that the regulations correctly interpreted congressional intent. *North Haven*, 456 U.S. at 533-34. Because the Court did not recognize an implied private right of action until 1979, however, and has never addressed the

issue here (namely, whether a regulatory limitation on a regulatory right is jurisdictional), congressional acquiescence cannot serve as a reliable indicator of congressional intent in this case.

4. Department of Education Organization Act

Assuming *arguendo* that Title IX or the Javits Amendment conferred *any* unique authority on HEW or the HEW Secretary, DE nonetheless cannot lay claim to that authority. In splitting HEW into DE and the Department of Health & Human Services ("HHS"), the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) ("DEOA") reserved to HHS all functions not transferred to Education. 20 U.S.C. § 3508(b). As explained below, DEOA did not transfer either Title IX or the Javits Amendment. Consequently, one of two situations applies: (1) as inheritor of all non-transferred HEW authority, HHS is the Title IX czar, or (2) consistent with their plain language and legislative histories, neither Title IX nor the Javits Amendment confer any interpretive authority on HEW, HHS, DE, or any other agency.

DEOA Section 301 transferred "functions" from HEW and its officers to DE and its officers. *See* 20 U.S.C. § 3441(a)(1)-(6), (b). Subsections 301(a)(1), (a)(5), (a)(6), and (b) transfer functions of various education-related subordinate officers, offices, and councils within HEW, which by their terms do not address either HEW's Title IX authority or the HEW Secretary's Javits Amendment authority. Likewise, Subsection 301(a)(4) transferred HEW functions under the Rehabilitation Act of 1973 and certain HEW functions administered by the Commissioner of Rehabilitation Services. And Subsection 301(a)(2) transferred all HEW functions under seventeen enumerated statutes, which do not include either Title IX or the Javits Amendment. *Compare* 20 U.S.C. § 3441(a)(2) (list of transferred functions) *with* 20 U.S.C. § 1682 (Title IX rulemaking authority) *and* Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (Javits Amendment).

The only potentially relevant subsection, Subsection 301(a)(3),[11] transferred "all [HEW] functions with respect to or being administered by the [HEW] Office of Civil Rights *which relate to functions transferred by this section.*" 20 U.S.C. § 3441(a)(3). Because it applies only to "functions transferred by this section," it does not include rulemaking authority under Title IX or the Javits Amendment, which Section 301 did not transfer. Further, as distinct from enforcement authority, HEW's *rulemaking authority* was administered by the *HEW Secretary,* and thus was not "being administered by the Office of Civil Rights," as required for Subsection 301(a)(3) to apply.[12]

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[11] In *dicta* without analysis, this Court indicated that Subsection 301(a)(3) transferred Title IX authority to the newly created DE. *North Haven,* 456 U.S. at 516 n.4. *North Haven* involved litigation commenced against HEW but completed against DE, and the cited footnote explains the Court's convention to refer to the government party as "HEW." *Id.* Although it did not matter whether HHS or DE defended the employment regulations in *North Haven, amicus curiae* CSC respectfully submits that the *North Haven dicta* misstates the impact of Subsection 301(a)(3).

[12] Had the DEOA transferred the HEW Office of Civil Rights to DE, as the Senate Bill proposed, one could make a strained argument that Subsection 301(a)(3)'s "relates-to" clause includes any "function" related to any authority wielded by that Office. But the Senate receded to the House in Conference, and the DEOA created a new Office of Civil Rights

(Footnote cont'd on next page)

In sum, nothing in Section 301 or elsewhere in the DEOA transfers rulemaking authority to DE. Instead, like any other agency, DE draws its rulemaking authority from Title IX itself, which authorizes and directs *each* federal agency to issue Title IX regulations. 20 U.S.C. § 1682. Thus, under this authority, DE issued regulations upon its formation in 1980, 34 C.F.R. pt. 106, while HHS retained the original HEW regulations, 45 C.F.R. pt. 86.

B. Regulations that *Define* Statutory Terms

As indicated above, *Sandoval* recognized that authoritative regulations that construe statutory terms are enforceable to the same extent as the underlying statute. 532 U.S. at 284; *see also Wright v. City of Roanoke Development & Housing Authority,* 479 U.S. 418, 419-23 (1987). Thus, for example, if the retaliation regulation defines "discrimination" as used in Section 901(a), an appropriate plaintiff could enforce the regulation under the implied private right of action to enforce Section 901(a).[13]

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within DE instead of transferring HEW's Office of Civil Rights. *See* H.R. Conf Rep. 96-459, 46-47, *reprinted in* 1979 U.S.C.C.A.N. 1612, 1626; 20 U.S.C. § 3413 (creating DE's Office of Civil Rights). Thus, the strained argument is neither availing nor available.

[13] In support of the petition for *certiorari, amicus curiae* United States claimed that the Department of Education's Office of Civil Rights' policy guidance on sexual harassment demonstrates an agency view that Title IX (the statute) prohibits retaliation. *See* U.S. Br. at 10. The off-hand discussion in that document fails to distinguish between (1) Section 901(a) itself, and (2) "Title IX" writ large as the totality of the Title IX

(Footnote cont'd on next page)

Amicus curiae CSC is not aware of any contemporaneous documents that indicate that HEW intended its retaliation regulation *to define* Section 901(a), as distinct from issuing a procedural rule *to effectuate* that section.[14] 20 U.S.C. § 1682. Because an agency action can be upheld only on the basis that the agency articulated, *Motor Vehicle Ass'n v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 50 (1983), it appears unlikely that Coach Jackson (or even DE) now could claim that the retaliation regulation defines Section 901(a).

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regulatory regime. *See* 62 Fed. Reg. 12,034, 12,044 (1997) ("because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry"). As such, the document simply begs the question: namely, which prohibits retaliation, the statute or the regulation? At any rate, no rule, regulation, or order of general applicability takes effect until signed by the President, 20 U.S.C. § 1682, 110 Cong. Rec. 2499, or – since 1980 – by the Attorney General, 46 Fed. Reg. at 29,704. Because it qualifies as an interpretive "rule" or "order" of general applicability, 5 U.S.C. § 551(4); *FTC v. Standard Oil Co. of California,* 449 U.S. 232, 238 n.7 (1980) ("order" means "the whole or a part of a final disposition . . . of an agency in a matter other than rule making"), DE's failure to comply with 20 U.S.C. § 1682 renders the document immaterial to this or any other litigation.

[14] The elimination of gender discrimination constitutes a matter of public concern about which public employees would have First Amendment rights "to speak out freely . . . without fear of retaliatory dismissal." *Pickering v. Board of Ed. of Township High School Dist. 205,* 391 U.S. 563, 572 (1968); *Connick v. Myers,* 461 U.S. 138, 149 (1983) (same). The viability of Coach Jackson's asserting a First Amendment claim is not before this Court.

Even if the retaliation regulation authoritatively construes Title IX, however, Coach Jackson may not have a private right of action for at least three reasons. First, it is not at all clear that his amended complaint states a claim under the retaliation regulation. Second, accepting that a *valid* regulation could authoritatively construe Title IX to prohibit certain retaliatory acts, the retaliation regulation here appears invalid. Third, as indicated in Section III, *infra,* Coach Jackson's apparent failure to meet the *regulatory* preconditions for bringing suit would foreclose a private right of action created by regulation.

By its terms, the retaliation regulation protects only two types of activity: (1) statutorily protected activity, and (2) participation in a regulatory enforcement proceeding. 45 C.F.R. § 80.7(e); 34 C.F.R. § 100.7(e).[15] Without a regulatory proceeding, Coach Jackson must allege a statutory violation in order to fall under the terms of the retaliation regulation.

In ¶ 7 of his amended complaint, Coach Jackson alleges that he advised his supervisor of "gender discrimination" against his team, his team's being prohibited from using various equipment including a locked "sports facility" to which his team lacked a key, and "serious infractions" regarding unspecified "expense accounts." In his petition for *certiorari,* Coach Jackson clarifies that his "girls' team was

[15] Because no President before 1980 and no Attorney General since 1980 has signed the DE regulations, those regulations have not yet taken effect. 20 U.S.C. § 1682. Because the DEOA's savings clause continues the HEW regulations (*i.e.,* the HHS regulations) in effect until DE modifies them, 20 U.S.C. § 3505(a), *amicus curiae* CSC cites the current HHS regulations as well as the DE regulations.

denied equal funding and equal access to athletic equipment and facilities." Pet. for Cert. at 3.

As clarified, Coach Jackson nevertheless still has not asserted a claim for intentional gender-based discrimination (*i.e.,* actions taken *because of* gender, as opposed to in spite of it). Although one perhaps could infer a "disparate-treatment claim," such a claim "requires proof of a discriminatory purpose," *Teamsters v. United States,* 431 U.S. 324, 335-336, n. 15 (1977), which the amended complaint does not allege. Further, standing alone, with no allegation of intentional discrimination, disparate funding is not a regulatory violation, 45 C.F.R. § 84.41(c) ("unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section"), 34 C.F.R. § 106.41(c) (same), much less a statutory violation.

Further, the retaliation regulation appears to create a strict-liability regime for any action to "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by" Section 901(a). 45 C.F.R. § 80.7(e); 34 C.F.R. § 100.7(e). In the First-Amendment context, however, this Court has allowed a government actor to avoid liability for retaliation or discrimination by proving that it would have made the same decision without the impermissible motive. *Texas v. Lesage,* 528 U.S. 18, 21 (1999). In a related First Amendment context, the Court deemed invalid a National Labor Relations Board standard for imposing liability on retaliatory lawsuits that were unsuccessful, but nonetheless also reasonably based. *BE & K Const. Co. v. N.L.R.B.,* 536 U.S. 516, 535-37 (2002). Under this admittedly cursory analysis, it appears

likely that the Title IX retaliation regulation is overbroad and thus invalid.

C. Regulations that *Expand* on Statute

In *Sandoval*, this Court held that regulations that expand on the statutory prohibition could not form the basis for a private right of action. 532 U.S. at 291. Although *Sandoval* involved a regulatory disparate-impact standard, and this case involves a regulatory prohibition against an intentional act (namely, retaliation), that is a distinction without a difference. To the extent that an agency's regulation expands upon a statutory provision, the regulation cannot support a private right of action. 532 U.S. at 291. This case presents no reason to reverse *Sandoval*.

III. SPENDING-CLAUSE LEGISLATION CANNOT IMPOSE LIABILITY WITHOUT NOTICE

This Court analogizes Spending-Clause programs to a contract struck between the government and recipients, with the public as third-party beneficiaries. *Gorman*, 536 U.S. at 186. To impose conditions on recipients, Congress must express statutory conditions unambiguously. *Id.* Provided it receives that notice, the recipient becomes subject to enforcement for intentional violations of the statute, either by the government or by the injured public. 536 U.S. at 187-89.

In *Cannon*, this Court held that the victim of statutory discrimination could bring her implied statutory right of action without first exhausting administrative remedies. 441 U.S. at 687-89 & n.8 (discussing history of HEW interpretations regarding exhaustion of administrative remedies). But just as *Sandoval* confined *Cannon* to implied rights of action for statutory discrimination, this case should

confine the *Cannon* to omitting exhaustion requirements only for statutory discrimination.

By contrast, when a regulation creates the provision being enforced, the regulation's other components are an integral part of the bargain that the third-party beneficiary would enforce. In other words, to ensure the notice required for Spending-Clause litigation, the third-party beneficiary must comply with the regulatory preconditions to suit. *See* 45 C.F.R. § 80.8(a), (d) (requiring administrative complaint, review by DE officials, and pre-litigation notice); 34 C.F.R. § 100.8(a), (d) (same). Rather than "cherry pick" from among the regulations to enforce, "under traditional principles of contract interpretation, . . . third-party beneficiaries generally have no greater rights in a contract than does the promise." *United Steelworkers of America, v. Rawson*, 495 U.S. 362, 375 (1990) citations omitted).

Had Coach Jackson filed an administrative complaint before this lawsuit, the parties may have settled without the burden and expense of litigation. If education generally and sports particularly continue to exact high litigation costs, schools may become reluctant (or even unable) to offer such non-core programs, no matter how invaluable to students. Perhaps worse, the fear of such awards could chill schools' First Amendment autonomy. If, contrary to the allegations in his amended complaint (¶ 2), Coach Jackson failed to satisfy all conditions precedent to bringing suit, this Court should give Birmingham the benefit of its bargain: namely, no litigation exposure without the regulatory compliance process.

CONCLUSION

To dispose of the case before it, the Court could apply any of several narrow theories. Alternatively, the Court expansively could address the issues raised here, remanding if necessary to determine whether Coach Jackson's action can survive. Whatever the disposition, *amicus curiae* CSC respectfully submits that an expansive ruling will best serve educational institutions and educators alike, and thus the end-users of education: the students.

August 19, 2004

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IN THE

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RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE* [1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. Its general mission includes education and legal efforts directed towards limiting the power of the federal government and promoting individual liberty and free enterprise. Specifically, EFELDF has strived for years to defend and protect educa-

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[1] No counsel for a party has written this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the timely filing of all *amicus curiae* briefs in this matter and copies of their letters of consent have been lodged with the Clerk of the Court.

tional opportunity against government interference. EFELDF has long been an advocate for enhancing opportunities for men and women without ignoring important differences between the genders. EFELDF has successfully filed *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals. It also participates in educating and training students of all ages.

Amicus has a direct and vital interest in the issues presented to this Court based on its active participation in education for over two decades.

SUMMARY OF ARGUMENT

This action to eviscerate the precedent of *Alexander v. Sandoval* must fail. 532 U.S. 275 (2001). Only Congress, and not the courts, can create a private cause of action. Congress has not done so here. The male petitioner Roderick Jackson was replaced as the basketball coach of the schoolgirls' team, while retaining his teaching job. He cannot invoke Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, by claiming that the substitution was retaliation for his complaints about discrimination against the girls' team. The decision below properly denied a private cause of action for retaliation under Title IX.

Petitioner and his *amici* are mistaken in arguing that the judicially created private cause of action for alleged discrimination under Title IX has been beneficial and therefore should be expanded. Quite the contrary, the result of the existing private cause of action has been disastrous to the goals of Title IX to increase and protect athletic opportunities in schools. Schools have adopted a deleterious quota-like system in defense against actual and threatened lawsuits by private parties. Known as the "proportionality test," an informal regulation combined with many private claims has compelled colleges to reduce the proportion of men on their sports teams towards the proportion of men enrolled as students. 44 Fed.

Reg. 71,418 (1979) (advising that "intercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments"). This has thwarted opportunities for both men and women, and our overall athletic competitiveness has declined. There is no basis for extending this failure to a new genre of litigation for retaliation.

Petitioner Jackson had several existing remedies available to him for the retaliation that he alleges. He could have sued citing First Amendment protections for his speech, or taken action under Title VII for employment discrimination. There is no need or justification for expanding Title IX to address petitioner's complaint about being removed as the coach of a girls' basketball team.

ARGUMENT

I. TITLE IX DOES NOT AUTHORIZE A PRIVATE CAUSE OF ACTION FOR THE ALLEGED RETALIATION.

This Court made clear in *Alexander v. Sandoval* that private causes of action can only be created by Congress, not by agencies or by federal courts. 532 U.S. 275 (2001). "[P]rivate rights of action to enforce federal law must be created by Congress . . . [and w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

As the government acknowledges here, "Title IX does not expressly authorize a private suit to enforce its prohibition." Brief for the United States as Amicus Curiae Supporting Petitioner [hereinafter, "Govt. Br."] at 8. Under *Sandoval*, that observation settles this matter. Federal courts cannot create private causes of action not authorized by Congress, and Congress did not authorize this type of action. Federal courts lack a general common law type of power, whereby

causes of action may be created willy-nilly to remedy perceived injustices.

The government, petitioner, and his *amici* rely entirely on decisions rendered *before Sandoval*. These precedents did allow private causes of action by direct victims of intentional sex discrimination under Title IX. *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Cannon v. University of Chicago*, 441 U.S. 677 (1979). More recent decisions, which also predate *Sandoval*, adhered to *stare decisis* and stayed the course. *See, e.g., Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). But those decisions are now anachronistic in light of *Sandoval*, and it is time to jettison their faulty premise that federal courts can somehow invent causes of action not expressly mandated by Congress.

This Court recently clarified that even an implied private cause of action cannot extend to where the statute lacks a private remedy. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). "[A] plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 284 (emphasis in original). There was no such private remedy in *Gonzaga Univ.* for a proven violation of a student's privacy, and there is none here for alleged retaliation against a girls' basketball coach. The benefited class that is the focus of Title IX does not include advocacy by male basketball coaches, and hence petitioner Jackson lacks an implied cause of action.

Regardless of their continuing vitality, the *Cannon* precedents do not support the judicial creation of a new category of lawsuits for alleged retaliation. Petitioner, a male, was not "excluded from participation in, [] denied the benefits of, or [] subjected to discrimination under any education program or activity receiving Federal financial assistance" on the basis of his sex, as prohibited by Title IX. 20 U.S.C. § 1681(a). Only by piling inference upon inference is it possible to argue that

Congress authorized private actions for retaliation under Title IX. Such a conclusion here would eviscerate *Sandoval*, demolishing its barrier to judicial creation of new causes of action. It would become open season for all sorts of federal lawsuits alleging discrimination if a male can sue under Title IX based on his comments about school policies towards boys and girls.

"Retaliation" does not mean "discrimination" by any accepted use of those two terms, and Title IX protects only against "discrimination". The government baldly asserts that "[u]nder Title IX, retaliation against a person because that person has filed a sex discrimination complaint is a form of intentional sex discrimination." Govt. Br. at 8. But at most the retaliation is based on what someone said, not on who he is. Retaliation could only consist of different treatment based on the exercise of free speech, not based on sex.

The government argues that because victims of sexual harassment have been allowed to sue under Title IX, then a victim of retaliation for speech must also be able to sue. But a bona fide victim of sexual harassment does indeed suffer because of her gender. A victim of retaliation for speech does not. He may be able to assert a claim based on infringement of his First Amendment rights, but nothing in Title IX supports the action at bar. Petitioner's own sex played no "role in the [decision-making] process" nor "had a determinative influence on the outcome," a limitation on Title IX actions that even the government concedes. Govt. Br. at 10 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

Judicial creation of a private cause of action would not advance the purpose of Title IX even if this test did survive *Sandoval*. Congress expressly limited the scope of its prohibition against sex discrimination, and plainly did not confer job entitlements on those who advocate identical treatment of boys and girls. Coach Jackson evidently has his own opinion of how boy and girl athletes should be treated, and he is free

to express it. But he does not magically receive job protection under Title IX based on his views and how he expresses them. The government argues that Title IX's "objectives would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." Govt. Br. at 13. But this type of case first reaches this Court over thirty years after the passage of Title IX, illustrating how infrequent this retaliation is.

Congress did hear some testimony about retaliation prior to its enactment of Title IX. But to the extent legislative history is even relevant, such testimony supports the view that Congress declined to include in Title IX any protection against retaliation based on speech about sex discrimination. This could have been because real retaliation was rare, or because Congress respects employment at will, or perhaps even reflects a desire to avoid fomenting additional lawsuits in a litigious society. Regardless, federal courts cannot assume the legislative function and supplement what Congress passed. The government insists that "[t]here is no reason that Congress would have responded to that evidence by deliberately failing to address that aspect of the problem." Govt. Br. at 16. In fact, there are many possible reasons for Congress to leave that issue out of Title IX, as enumerated above, and the lack of litigation before this Court on this issue in over thirty years suggests that it was wisely omitted.

It is crystal clear under *Sandoval* that agencies, such as the Department of Education, may not by regulatory fiat create a private cause of action missing in the statute. Yet the government bases its argument for a private cause of action on a statement in the Federal Register that discriminatory "retaliation is prohibited by Title IX." Govt. Br. at 17 (citing 62 Fed. Reg. 12,044 (1997)). Insisting that *Chevron* deference is appropriate to regulations here, the government argues that this and other agency pronouncements support a private cause of action. *Chevron U.S.A. Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837 (1984). But *Sandoval* put an end to that game, and stopped the usurpation of congressional power by unelected administrators. "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291. *Chevron* has no application here.

Nor can a private cause of action be read into a statute by virtue of a prior decision of this Court addressing an entirely different statute and an entirely different form of discrimination. Petitioner relies heavily on *Sullivan v. Little Hunting Park, Inc.*, in which this Court found that overt and intentional racial discrimination prevented a white man from leasing property to an African-American. 396 U.S. 229 (1969). The Court allowed plaintiff Sullivan to pursue this claim based on his direct injury from the discrimination, and also to recover for retaliation that he suffered, in order to avoid "giv[ing] impetus to the perpetuation of racial restrictions on property." *Id.* at 237. But the existence of this precedent provides no support for the view that Congress intended a similarly broad remedy for athletic coaches allegedly complaining about disparate access to facilities. Congress may well have been aware of *Sullivan* but not inclined to extend it beyond racial covenants.

At bottom, this action is a direct challenge to *Sandoval*, a precedent that the government opposed then and implicitly continues to do so now. Martha Sandoval had no private cause of action for an alleged disparate impact on her national origin, and petitioner Jackson has no private cause of action for an alleged disparate impact on the girls he coached. Just as it would be absurd to allow state employees at the Alabama Department of Motor Vehicles to sue as a surrogate for Sandoval, petitioner Jackson cannot sue as a surrogate for the girls. It would gut *Sandoval* to shift the cause of action to a class of third-party private litigants a further step removed

from the statutory prohibition, and this Court should decline the invitation here to undermine its own recent precedent.

II. THE IMPLIED PRIVATE CAUSE OF ACTION UNDER TITLE IX HAS REDUCED OPPORTUNITY AND IMPAIRED COMPETITIVENESS.

The implied private cause of action under Title IX, combined with the informal regulation known as the "proportionality test," has spawned countless lawsuits to enforce quota-like policies. The proportionality test compares the male-to-female ratio on competitive sports teams with the male-to-female school enrollment ratio. 44 Fed. Reg. 71,418 (1979). This leads schools to eliminate sports teams in senseless ways that Congress never intended, and arguably even prohibited in Title IX itself. But in order to avoid million-dollar lawsuits and the prospect of paying plaintiffs' attorney's fees, schools have had little choice but to favor unthinking equality of result at the expense of opportunity for the most interested. That has meant eliminating hundreds of valuable athletic teams and opportunities for students in order to play a numbers game to equate overall male and female participation.

The result has been the elimination of hundreds of teams and an inevitable decline in competitiveness. Since promulgation of the proportionality test in 1979, the medal share won by the United States Olympic team has dramatically and predictably declined, the breakup of the Soviet bloc notwithstanding. Quotas impair competitiveness, whether for race or gender. Extending the cogent reasoning of *Alexander v. Sandoval* to Title IX would rightly end private enforcement of these unjustified quotas and restore true opportunity and competitiveness to our athletic system. Just as victory should go to the best competitor on the field, regardless of race or gender, teams should be funded for the most talented and motivated.

A. Athletic Competitiveness and Opportunities Have Declined Sharply Due to the Enforcement of Title IX Quotas Through the Private Cause of Action.

Never in history has the United States participated in the Olympics and returned with such a small percentage of medals as in the last two, in 2000 and 2004.[2] Greg Louganis, a four-time Olympic gold medalist, has seen his original college diving team eliminated. For the first time, we failed to bring home a single diving medal from the recent summer games in Athens. The famous men's swimming team at UCLA that previously produced 16 Olympic champions has been terminated due to the Title IX quotas. Our Olympic swimmers are now heavily dependent on private clubs rather than schools. In 2002, Howard University felt compelled to eliminate its baseball team entirely, and its wrestling team too. Mark Asher, "Howard Drops Baseball, Wrestling," *Washington Post*, D1 (May 23, 2002). The American team in baseball, our national pastime, failed even to qualify to compete at the Olympics in Athens. The United States could win only one gold medal in wrestling in 2004. In fact, no American men's team (other than rowing and relays) was able to win the gold medal this year, and most of the individual men and women gold medal winners developed their skills in private clubs rather than Title IX programs.

Enforcement of Title IX quotas through the private cause of action has caused pervasive elimination of wrestling teams at college. In 1981-82, 52.7% of NCAA Division I colleges had a wrestling team. By 2000-01, only 27.1% of colleges did. *See* NCAA Sport-by-Sport Participation and Sponsorship-Men's Sports 1982-2001, at 119.[3] Despite a substantial

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[2] *See* http://www.fanbay.net/olympics/us.htm (viewed Oct. 3, 2004).

[3] *See* http://www.ncaa.org/library/research/participation_rates/1982-2001/091-120.pdf (viewed Oct. 4, 2004).

increase in the number of colleges in the NCAA Division I during that period, the number of athletes competing in wrestling declined from 3,659 to 2,662. *Id.* Similar declines occurred in NCAA Divisions II and III. Overall, the number of colleges in the NCAA increased from 787 to 1,049 from 1981-21 to 2000-01, yet the number of wrestlers declined from 7,914 to 5,966. *Id.* This decline is due not to high costs of wrestling (it is inexpensive) nor to any decline in demand, which remains high as reflected by the continuing popularity of high school programs. *See* National Federation of State High School Associations Participation Study 1971-01, at 191.[4]

The private cause of action has forced schools even to eliminate self-funded wrestling teams that impose no burden on the institution. Why? Because private lawsuits invoke the informal quotas in a way that the Executive Branch never would. The private litigants demand the "proportionality" that encourages colleges to reduce the proportion of men on sports teams to the overall proportion of men enrolled as students. 44 Fed. Reg. 71,418 (the first prong of the 1979 Policy Interpretation directs that "intercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments"). This bean-counting approach favors sports with large squad sizes for women, and reducing men's squad sizes or completely eliminating their teams. The resulting distortion is hurtful to both women and men.

The March 2001 General Accounting Office (GAO) report bears this out. In the 1980s and 1990s, women's sports with large squad sizes have ballooned. *See* United States General Accounting Office (GAO), "Intercollegiate Athletics, Four-Year Colleges' Experiences Adding and Discontinuing

[4] *See* http://www.ncaa.org/library/research/participation_rates/1982-2001/175-192.pdf (viewed Oct. 4, 2004).

Teams," GAO-01-297 [hereinafter, *GAO Report*] 12 (Mar. 2001). Rowing (crew) is an example. It features the largest average squad size for women, an enormous 46.3 members per team. *Id.* at 9-12. The number of these teams increased by 184% during this time period, despite little to no interest at the high school level. *Id.* at 12. The University of Massachusetts women's rowing coach, Jim Dietz, bluntly admitted, "The reason we're here—everybody knows it—is for gender equity." Jessica Gavora, *Tilting the Playing Field* 66 (2002). Women's water polo, another large-squad-size sport, increased for women by 3,600%. *GAO Report* at 12. Women's equestrian, boasting an average squad size of 26.2, exploded with a 486% increase as athletic directors seek numerical balancing. *Id.* at 9-12. These increases result not from a boom in high school demand for these opportunities, but from colleges' attempt to boost women's participation numbers.

Meanwhile, an historically popular sport for women suffered the consequences of planning-by-the-numbers. Gymnastics fell by 53% during this time period. *Id.* at 12. During a time when Title IX required massive expenditures on women's sports to increase opportunities, women's gymnastics was cut from 190 teams to only 90. This reflects the small squad size of a gymnastics team, making it unattractive in the numbers game. The small squads of fencing and archery, other women favorites, also fell sharply. *Id.* As a result, nearly all of the women on the Olympic gymnastics team developed their skills in private clubs rather than Title IX programs. In the 2000 Olympics we failed to win a single women's gymnastics medal, and in 2004 the only gymnastics medals were won by private club, non-Title IX athletes.

In sports for which women share the practice facility with men, the elimination of the men's team means that the practice facility is eliminated for women too. Fencing is an example. The elimination of 42 men's fencing teams between 1981-82 and 1998-99 caused a similar elimination of nearly

as many teams (31) for women. *Id.* Archery, too: the number of men's teams declined during the period to a total of only six in 1998-99, and the number of women's archery teams declined to the same small number. *Id.*

On the men's side, the combination of the proportionality test and private cause of action has caused declines in most of the large squad sports. Wrestling teams, as discussed above, have declined by 40%, reflecting a drop of the sport by an astounding 171 schools; 37 schools dropped football; 27 dropped outdoor track; 25 dropped swimming; and 10 ended ice hockey. *Id.* at 13.

An often cited example by proponents of the private cause of action is women's soccer, which did grow by 1,058% in college. *Id.* at 12. But that growth is not attributable to the private cause of action. Rather, this is an example of how supply met demand *without* private litigation, as girls' soccer grew by 912% in high school over the comparable period.[5] As such, soccer serves as the best proof that intercollegiate teams increase in proportion to demand, without the need for any private "attorneys general" fueling litigation across the country.

America has a hallowed tradition of producing tremendous women athletes long before the quotas of Title IX. Jackie Joyner-Kersee, "Babe" Didrikson Zaharias, Wilma Randolph, Pat McCormick, Althea Gibson and Bonnie Blair were among the greatest. Pat McCormick, for example, won double gold medals in diving at back-to-back Olympics, with

[5] According to the National Federation of State High School Associations, the number of girls' interscholastic soccer teams increased from 599 to 5,463 from 1977 to 1994, the high school years corresponding to the GAO's 1981-1998 survey of intercollegiate sports. *See* National Federation of State High School Associations Participation Study 1971-01, at 187. (http://www.ncaa.org/library/research/participation_rates/1982-2001/ 175-192.pdf).

her second pair of gold medals coming only five months after she gave birth. But the Title IX quotas, enforced by an unjustified private cause of action, have choked off opportunity for women divers and many other promising competitors. Petitioner's *amici* pretend that Title IX-funded women athletes have contributed to society like never before. But Pat McCormick went on to initiate a special program for the disadvantaged after her athletic triumph. Top achievers among Title IX-funded women athletes today seem instead to be posing nude in *Playboy*. Dan Bickley, "Hats Off to Women with Clothes On," *Arizona Republic*, 1C (Aug. 29, 2004). This is progress?

In sum, the implied private cause of action under Title IX, combined with the proportionality test, has been very hurtful to opportunity and competitiveness of sports in schools.

B. Men Have a Far Greater Interest in Competitive Sports than Women, and No Private Cause of Action Should Be Allowed to Exploit that Difference as Alleged Discrimination.

Male and female demand for competitive sports are far from equal. Women do not have as great an interest in spectator team sports as men do, and the converse is true for many extracurricular activities. It is scientific, not "stereotypical", to survey students and observe their differences in interests and needs by gender. To no one's genuine surprise, surveys show that high school senior boys are far more physically active than high school senior girls. For example, the Department's National Center for Educational Statistics (NCES) polled high school seniors who "actively participate in sports, athletics or exercising [e]very day or almost every day" over a fifteen year period from 1980 to 1994. By a wide twenty percent margin, males were more active than females in athletic activity. *See* Thomas Snyder and Linda Shafer, U.S. Department of Education, National Center for Education Statistics, *Youth Indicators*, 1996 (NCES 96-027) [herein-

after, *NCES Study*], at 110.[6] Similarly, males exercise vigorously (e.g., jogging, swimming, calisthenics, or other active sports) in much higher percentages than females do. *Id.* In 1992 and 1993, over twice as many high school males exercised vigorously as females. *Id.* This is a genuine difference in athletic interest, encompassing exercise beyond available competition.

This obvious disparity is reinforced simply by attending a sports stadium or visiting a weight room, or observing the advertisements on televised sporting events. *See* John Tierney, "Why Don't Women Watch Women's Sports?" Week in Review, *N.Y. Times* (June 15, 2003) ("The audience for this year's championship game in women's college basketball was 57 percent male, according to Nielsen Media Research. Annika Sorenstam's appearance in the Colonial golf tournament last month may have been a giant leap for women, but 65 percent of the witnesses were men.").

The private cause of action under Title IX relies on the fiction that differences by gender in enthusiasm for competitive sports do not exist. Yet men and women are no more likely to have identical interests in competitive sports in college than they were in high school, where their interests diverged by a wide margin. *See NCES Study* at 110. Surely one would not expect the fans at a typical professional sporting event to be split evenly between men and women.

Former Senator Birch Bayh argues for gender equality in participation, something Congress never passed. He complains that "women athletes still lag behind their male counterparts. For example, . . . 53% of the student population are women [while] 41% of the athletes are women." Brief *Amicus Curiae* of Birch Bayh in Support of the Petitioner [hereinafter, *Bayh Brief*] at 23. But there is nothing alarming about

[6] *See* http://nces.ed.gov/pubs98/yi/y9647a.asp (viewed Oct. 4, 2004).

these figures, which show less divergence than the enthusiasm for exercise in the NCES survey. Title IX does not mandate that more women become interested in sports, and we should not launch thousands of private attorneys general on a quest for that misguided goal. Bayh is free to argue that Title IX be expanded, but that is not a task for the judiciary. Congress has already spoken, and it expressly prohibits the quota approach urged here:

> Nothing contained in . . . this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federal program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.

20 U.S.C. § 1681(b).

Bayh argues in his brief that:

> Thanks to the progress Title IX has produced in college athletics, women have made great strides in professional sports. Women athletes have established the Women's National Basketball Association, the Women's United Soccer Association, and participate on teams within the United States Soccer Federation.

Bayh Brief at 22-23. There were five women's professional leagues formed after the 1996 Olympics in Atlanta. But four out of five failed and no longer exist, and the fifth survives based on funding by the men's professional basketball team. *See* Selena Roberts, "Heroines of '96 Find Road Isn't Paved With Gold," *N.Y. Times*, D6 (Aug. 27, 2004) ("After the Atlanta Games, five professional women's leagues were formed, but only one remains."). This would surprise no one who recognizes the vast difference in interest in men's sports compared to that of women's sports. Participation by gender

on college teams should be based on interest and talent; private causes of action should not be permitted to seek damages based on the faulty premise that interest in sports is the same for both genders.

Yet wherever there is a disparity in participation by men and women, or boys and girls, in competitive sports, a private cause of action lurks around the corner to loot the school. Equality of outcome in participation, even though it often requires discriminating against the most interested and motivated, is self-defense against the mugging. Nothing in Title IX justifies these legal tactics.

Even an imbalance in funding caused by *private donations* can trigger a Title IX lawsuit. The effect is to discourage the traditional and essential fundraising practices of many school sports programs. "Title IX provides almost a disincentive to parents who want to donate their time or money to improve the athletic facilities," said Bruce Gibbs, the director of schools for Cheatham County in Tennessee, the subject of one complaint. "Because those parents will want to do it for the one sport their kid plays. But a lot of school systems can't allow that kind of effort for just one sport because it can cause an imbalance." Bill Pennington, "Title IX Trickles Down To Girls of Generation Z," *N.Y. Times*, D1 (June 29, 2004).

Bayh concludes in his brief that "[o]ur daughters, like our sons, will expect the opportunity to participate on our college and university athletic teams." *Bayh Brief* at 22. But the combination of the proportionality test and the private cause of action ensures that will **not** happen. Men are seeing sharply decreasing opportunities on college teams, and even women are suffering from elimination of small-squad teams like gymnastics and archery. The land of opportunity has become a field of quotas and senseless denial of opportunity.

No longer does the prize go to the swiftest, but rather to the gender that makes the overall numbers balance.[7]

The mischief caused by this informal regulation and the implied private cause of action has been disastrous. To take just one example, plaintiffs brought a federal lawsuit against Brown University in 1992 over its budgetary decision to recast two men's and two women's sports teams as "intercollegiate" rather than "varsity". This decision affected more men than women, but the private cause of action hooked itself to Title IX. The litigation spanned over ten years and Brown was ultimately compelled to pay over one million dollars in plaintiffs' attorney's fees. *See Cohen v. Brown Univ.*, 2001 U.S. Dist. LEXIS 22438 (D.R.I. Aug. 10, 2001), *aff'd as modified*, 2001 U.S. Dist. LEXIS 20714 (D.N.H. Dec. 5, 2001) (later supplemented further).

Women's rowing first became an NCAA sport in 1997, but 85 colleges have quickly added it to their programs. Is this because of an outpouring of interest by women athletes? Not at all. In fact, many college scholarships are given to women who had never rowed before, simply to up their numbers. Juliet Macur, "Never Rowed? Take a Free Ride," *N.Y. Times*, D1 (May 28, 2004). "In the fall, rowing is a sport that you carry 70 to 80 people, then in the spring at least 46 kids get out and race," explained Ohio State's athletic director, Andy Geiger. "It's an expensive sport, but it's worth it. It really does help offset football." *Id.* "Offset" football? Women's rowing should not have anything to do with men's football. Mr. Geiger can only mean that the large squad size in

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[7] It is worth noting that Bayh began his arguments here for equal gender participation by giving credit solely to himself for authoring Title IX, despite that nearly everyone else credits the late Representative Edith Green as the true author. Her compelling views are quoted in the Conclusion, *infra*.

women's rowing helps meet the senseless quota target by offsetting the large squad size in men's football.

No one should be surprised, and it is no evidence of discrimination, when many talented women say "no thanks" to intercollegiate competition. The Title IX litigation against Brown University revealed that there were 93 unfilled positions for women on varsity teams. *See Tilting the Playing Field*, *supra*, at 79. It is typical for colleges to have difficulty finding women to meet its numerical athletic targets. The California State University/Cal-NOW Consent Decree Final Report on Title IX compliance found that "not enough qualified student-athletes accepted the offer" to participate in a summer school program designed to increase female athletes' overall numerical participation. *Id.* at 67. The *Journal of the American Medical Association* published data showing a higher rate for traumatic brain injuries to girls than boys in comparable sports. John Powell and Kim Barber-Foss, "Traumatic Brain Injury in High School Athletes," 282 *JAMA* 958-63 (1999).[8] In girls' softball, the rate of brain injury was double that for boys' baseball. *Id.* Knee injuries to girls and women, especially the torn anterior cruciate ligament (ACL) occur at a much higher rate for women in competitive sports than for men, and they are also more difficult to repair. Steroid use, spurred by competitive forces, may be particularly injurious to women. Many college women rationally choose not to compete, and their decisions should be properly factored into the analysis.

In deploring and ridiculing the senselessness of gender quotas, one college student published this amusing solution:

> [C]ollege sports for women should be compulsory. Granted, many women may insist they don't want to play sports, but after generations of patriarchal oppression, it isn't realistic to think women really know what they want. Even if they do, it may not be what radical feminists want for them. The goal of perfectly equal gender ratios is more important than what anybody 'wants.'

Arrah Nielsen, *University Daily Kansan* (Dec. 9, 2003). Though tongue-in-cheek, his argument rings true: what should matter is how many want to and can play the sports, not how many are enrolled in the school. *Cf. Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620 (1974); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989); *Hammon v. Barry*, 826 F.2d 73, 75 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988). Indeed, the Supreme Court has called it "nonsensical" to measure alleged discrimination by comparing participation levels from highly specialized pursuits with the general population. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989); *cf. Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 997 (1988) ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value").

Men and women have very different interests in competitive sports, and private causes of action denying such differences should not be allowed.

III. PETITIONER ENJOYED ADEQUATE ALTERNATIVE REMEDIES.

Title VII preempts Title IX for claims of employment discrimination as implicitly asserted by Petitioner Jackson here. A loophole in Title VII preemption should not be created just because the alleged direct victims of the discrimination were not themselves employees. The preemption can only be a function of the status of the plaintiff. If he is an employee, and Jackson was, then Title VII is the exclusive remedy for his claim of discrimination. Otherwise, people might be able to bypass Title VII by basing their claim

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[8] *See* http://jama.ama-assn.org/cgi/content/abstract/282/10/958

of discrimination on another class, such as customers or applicants.

Petitioner Jackson claims that he was a victim of unlawful discrimination aimed at his players. This cannot exempt petitioner from the exclusive remedies of Title VII for employment discrimination. "The Supreme Court has indicated that courts should hesitate before concluding that different statutory schemes provide parallel paths from a particular injury to a particular form of relief. The Court has held that, if Congress intended that one of the statutory schemes should be the exclusive way to vindicate a right, then plaintiffs are required to sue only under that statute." *Waid v. Merrill Area Public Sch.*, 91 F.3d 857, 861 (7th Cir. 1996) (citing *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979)). *See also Gibson v. Hickman*, 2 F. Supp. 2d 1481 (M.D. Ga. 1998) ("This court agrees with those courts finding that Title VII preempts employment discrimination claims for money damages brought under Title IX. To hold otherwise would eviscerate Title VII's technical and administrative requirements, thereby giving plaintiffs who work at federally funded educational institutions unfettered ability to bring what are in reality Title VII sexual discrimination claims without adhering to the same rules required of every other employment discrimination plaintiff in the country.").

Title IX simply does not entertain claims of employment discrimination based on gender. The U.S. Equal Employment Opportunity Commission (EEOC) is the appropriate entity to handle complaints of this sort, rather than federal court. Claimants can file their complaints with the EEOC whenever they feel victimized by gender discrimination, and Title VII provides the procedures and remedies for such actions. Nothing in Title IX warrants establishing an entire new channel for complaints about matters like a change in coaching of the school basketball team.

The government observes that "in Title VII, the prohibition against retaliation is one in a series of prohibitions against discrimination in employment that specify in great detail the kind of discrimination prohibited. Title IX's prohibition against discrimination, by contrast, is contained in a single general prohibition." Govt. Br. at 21 (citations omitted). This is a distinction without a difference. Title VII is the federal statutory framework for claims of employment discrimination, which is what petitioner Jackson essentially asserts. Title IX does not provide the comprehensive set of remedies that Title VII does, and Title IX should not be expanded to interfere with Title VII.

Petitioner even had another cause of action available to him in addition to Title VII. He could have sued based on the First Amendment for retaliation against his speech. As a government employee, he enjoyed a First Amendment right "to speak freely [about matters of public concern] without fear of retaliatory dismissal." *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 572 (1968) (public employees have First Amendment rights "to speak out freely [about matters of public concern] without fear of retaliatory dismissal"); *see also Connick v. Myers*, 461 U.S. 138, 149 (1983) (same). There is no need or basis for creating a third avenue to relief for an allegedly improper changing of coaches at the helm of the girls' basketball team.

Petitioner had adequate alternative means for redress of his claims, based on Title VII or the First Amendment. It is not necessary or desirable to create yet another federal remedy for a deposed school basketball coach who did not even lose his job. Title IX does not provide yet another remedy for him, and his claims were correctly denied by the court below.

CONCLUSION

The author of Title IX, Representative Edith Green, later lamented that:

> In 1972 when we enacted the Higher Education Act—including Title IX—to end discrimination against women, we sought to be exceedingly explicit so that the establishment of quotas would be prohibited. I was surprised and dismayed when complaints from colleges and universities came in stating that the Department of Labor was requiring them to meet quotas. . . . Title IX was not designed to do away with intercollegiate sports.

Edith Green, "The Road Is Paved With Good Intentions," Address at Brigham Young University (Jan. 25, 1977). Representative Edith Green would be even more "surprised and dismayed" to see the judicial invention of a private cause of action to enforce Title IX in ways never intended.

The decision below dismissing petitioner's claims should be affirmed.

Respectfully submitted,

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No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* LEADERSHIP CONFERENCE ON CIVIL RIGHTS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Leadership Conference on Civil Rights ("LCCR") is a coalition of more than 180 national organizations committed to the protection of civil and human rights in the United States.[1] Founded in 1950, it is the nation's oldest, largest, and most diverse civil and human rights coalition. Its member organizations, including *inter alia*, the American Civil Liberties Union, the AFL-CIO, the Lawyers' Committee for Civil Rights Under Law, the Mexican American Legal Defense and Educational Fund, the National Association for the Advancement of Colored People, the American Federation of Teachers, the Union of American Hebrew Congregations, the NAACP Legal Defense and Educational Fund, Inc., and the Disability Rights Education and Defense Fund, Inc., represent men and women of all races and ethnicities.[2]

The LCCR promotes effective civil rights legislation and policy, as well as the strong enforcement of extant statutory and constitutional protections of civil rights. The LCCR was in the vanguard of the movement to secure passage of the Civil Rights Act of 1964, including Title VI and Title VII, the Voting Rights Act of 1968, and the Fair Housing Act of 1968. Its numerous members have also supported the enactment and vigorous enforcement of Title IX of the Education Amendments of 1972. In addition, its members are dedicated to preserving the interest of individuals in raising issues of

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[1] Pursuant to Supreme Court Rule 37.3, all parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* LCCR certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than LCCR, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief.

[2] The appendix to this brief is a list of LCCR member organizations.

unlawful discrimination and the interest of society in having those issues brought to light.

The LCCR strongly supports petitioner's position that the implied private cause of action for violations of Title IX necessarily encompasses redress for retaliation for complaints about unlawful sex discrimination. Based on its long experience in supporting and monitoring the enforcement of federal anti-discrimination mandates, the LCCR's unequivocal judgment is that a remedy for reprisal discrimination is indispensable to the efficient, effective enforcement of Title IX, and of federal anti-discrimination laws generally, as demonstrated in this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Correctly construed, the major federal statutory anti-discrimination provisions, including Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, prohibit retaliation for complaints about unlawful discrimination, either explicitly or implicitly. As a textual matter, a person is "subjected to discrimination" under Title IX (and any anti-discrimination statute) if he or she is punished based on a complaint about unlawful discrimination. As a practical matter, a statute intended to end unlawful discrimination must forbid related reprisals. Retaliation "deter[s] victims of discrimination from complaining," *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997); restricts "access to statutory remedial mechanisms," *id.*; and "give[s] impetus to the perpetuation of [discrimination]," *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). Because retaliation thoroughly and directly undermines the purpose and effect of an anti-discrimination law, such a law is fundamentally dependent upon a prohibition of reprisal discrimination. The former cannot be enforced without the latter.

These principles apply with full force to Title IX – just as they apply to Title VI of the Civil Rights Act of 1964, 42

U.S.C. § 2000d, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). Title IX was enacted to eliminate sex-based discrimination in the many federally-assisted education programs in this nation. Section 901(a) of Title IX broadly prohibits sex-based discrimination under any federally-assisted education program, and this Court has instructed that it must be "accord[ed] . . . a sweep as broad as its language." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 521 (1982) (internal quotation marks omitted). The statutory prohibition of sex-based discrimination clearly encompasses related reprisal discrimination. No other interpretation of § 901(a) would be consistent with Title IX's "focus on the benefited class" and Title IX's acknowledged objectives – *viz.*, "to avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." *Cannon* v. *University of Chi.*, 441 U.S. 677, 704 (1979).

Indeed, this Court has defined sex-based discrimination under Title IX to include a school district's failure to respond adequately to known acts of sexual harassment by those within its control. See *Davis ex rel. LaShonda D.* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 643 (1999) ("whether viewed as 'discrimination' or 'subject[ing]' students to discrimination, Title IX '[u]nquestionably . . . placed on [the school district] the duty not' to permit [sex discrimination] in its schools, and recipients violate Title IX's plain terms when they remain deliberately indifferent to [sexual harassment]") (omission and first two alterations in original) (citation omitted) (quoting *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 (1992)). *A fortiori*, a school district or other federally-funded program discriminates when it *retaliates* against those who complain about discrimination. Under the current interpretation of Title IX, a federal-fund recipient is liable for sexual harassment only after it receives "notice" and fails to take advantage of "an opportunity to take action to end the harassment or to limit further harassment." *Gebser* v.

Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289 (1998). Protection against reprisal discrimination is essential under Title IX and all civil rights statutes, but it is particularly necessary when some kind of notification is a precondition for liability. Reprisal discrimination is utterly inconsistent with such schemes because it discourages the action (*i.e.*, notification) that is a prerequisite to enforcement.

For these reasons, a cause of action under an anti-discrimination statute must include a private right of action based on retaliation. The most notable examples are found in the Reconstruction Statutes. In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), this Court recognized that § 1982 must ban reprisal against individuals who challenge unlawful race-based discrimination in contracting, because any other interpretation would give "impetus to the perpetuation of racial [discrimination]" in direct contravention of the purpose of the statute. *Id.* at 237. Accordingly, all federal circuit courts to consider the question with respect to §§ 1981 and 1982 have found that "[t]he ability to seek enforcement and protection of one's right to be free of racial discrimination is an integral part of the right itself." *Goff* v. *Continental Oil Co.*, 678 F.2d 593, 598 (5th Cir. 1982); see *infra* at 18-20.

Critically, all federal circuit courts to address the issue have also concluded that the implied private rights of action arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Rehabilitation Act and, until this case, Title IX, include claims of reprisal discrimination. See, *e.g.*, *Peters* v. *Jenney*, 327 F.3d 307, 317-19 (4th Cir. 2003); *Neudecker* v. *Boisclair Corp.*, 351 F.3d 361, 363-64 (8th Cir. 2003) (per curiam); *Lowrey* v. *Texas A&M Univ. Sys.*, 117 F.3d 242, 254 & n.23 (5th Cir. 1997). Similarly, the express causes of action provided to federal employees under Title VII and the Age Discrimination in Employment Act, 29 U.S.C. § 621 – which do *not* include express provisions banning retaliation – have nonetheless been interpreted to

forbid reprisal discrimination. See *Porter* v. *Adams*, 639 F.2d 273 (5th Cir. 1981); *Forman* v. *Small*, 271 F.3d 285, 298 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002). This virtual unanimity reflects the indispensable relationship between prohibiting reprisals and preventing and remedying unlawful discrimination.

The numerous federal statutes containing express prohibitions of reprisal discrimination support, rather than detract from, this conclusion. In delineating the scope of an implied cause of action, this Court uses existing express causes of action addressing related conduct as a model. For example, in determining the scope of the implied cause of action under § 10(b) of the Securities Act of 1934, the Court declined to impose aider and abettor liability. Because "*none* of the express causes of action in the 1934 Act further imposes liability on one who aids or abets a violation," the Court inferred that Congress did not intend to impose such liability in implied causes of action. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 179 (1994) (emphasis added); see also *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 297 (1993) ("consistency [with express causes of action] requires us to adopt a like contribution rule for the [implied] right of action"). Title IX was enacted in 1972; and at that time (and since), all major federal anti-discrimination statutes with express private causes of action forbade reprisal discrimination, either expressly or by implication. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); Fair Housing Act of 1968, *id.* § 3617; cf. also National Labor Relations Act, 29 U.S.C. § 158(a)(1); Fair Labor Standards Act, *id.* § 215(a)(3); *infra* at 22-24. This is strong evidence that Congress intended to forbid reprisal discrimination.

Any other interpretation of Title IX and its analogues would cause broad harm to the individuals whom these civil rights laws seek to protect. Clearly, if a person who participates in or is employed by a federally-funded program

is told that he or she has the right to be free of discrimination but is also told that any complaint about discrimination can be punished, that right has been eviscerated. Cf. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 208 (1989) (Brennan, J., concurring in the judgment in part and dissenting in part) ("if an employer offers a black and white applicant for employment the same written contract, but then tells the black employee that her working conditions will be much worse than those of the white hired for that same job because 'there's a lot of harassment going on in this workplace and you have to agree to that,' it would have to be concluded that the white and black had not enjoyed an equal right to make a contract"), *superceded by statute*, 42 U.S.C. § 1981. Moreover, Title IX, Title VI and the Rehabilitation Act apply to participants in and employees of federally-funded education programs. Students and employees are not in relationships of equality with program administrators and employers; and, in such settings, protection against reprisal is particularly important.

As our Constitution recognizes in the First Amendment's protection of the rights of free expression and petition, the ability to exercise these rights unchilled by punishment is essential to the effective enforcement of all other rights. The anti-discrimination laws' prohibitions of reprisal discrimination, both implied and express, simply recognize this reality – that the right to be free of discrimination cannot be enforced without the right to be protected from retaliation for complaints – in an important statutory context. The unprecedented decision of the court below should be reversed.

ARGUMENT

I. TITLE IX FORBIDS REPRISAL DISCRIMINATION.

A, The Text and Purposes Of Title IX Demonstrate That It Bans Reprisal Discrimination.

Section 901(a) of Title IX provides that

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. [20 U.S.C. § 1681(a).]

Congress enacted Title IX to eliminate sex-based discrimination in federally-assisted education programs in the United States. In so doing, Congress employed a statutory structure modeled on Title VI of the Civil Rights Act of 1964, which seeks to eliminate race-based discrimination in federally-assisted programs. Phrased in the passive voice, the provision is not written "as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Cannon*, 441 U.S. at 692-93, Instead, like Title VI, Title IX "expressly identifies the class Congress intended to benefit" and makes that protection its "unmistakable focus." *Id.* at 690-91.[3] The statutory structure creates personal entitlements of the sort that may be enforced through a private judicial cause of

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[3] This rights-creating language is entirely distinct from the language used in the Family Educational Rights and Privacy Act of 1974 ("FERPA") which, the Supreme Court has held, does not create an implied private right of action for its enforcement. Indeed, this Court contrasted the generic prohibitory language of FERPA – denying funding to schools with a policy or practice of releasing students' records without parental consent – with Title IX whose text "is phrased in . . . explicit rights-creating terms." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002).

action, *id.* at 689-93, as Congress has legislatively confirmed. See *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992) (agreeing that the amendments to Title IX "cannot be read except as a validation of *Cannon*'s holding").

Once Congress makes clear its intention to impose binding conditions on the receipt of federal funds, ordinary rules of statutory interpretation apply to determine the scope of those conditions and the means of their enforcement. This case addresses the scope of behavior that § 901(a) of Title IX proscribes, specifically whether retaliation against a person who complains about sex-based discrimination is itself discrimination. The parameters of the implied right of action are drawn to comport with the statutory text, structure and purposes. See *Musick, Peeler*, 508 U.S. at 294-97; *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983) (opinion of White, J.) (scope of the implied cause of action is construed "to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved"). Utilizing all of these resources, the Court "attempt[s] to infer 'how the [1972] Congress would have addressed the issue had the . . . action been included as an express provision in the' statute." *Central Bank of Denver N.A.*, 511 U.S. at 178.

The text of Title IX prohibits any person from being "subjected to discrimination" based on sex under a federally-funded education program. In defining the scope of Title IX, this Court has accorded Title IX "a sweep as broad as its language," generously construing Title IX to reach discriminatory practices not expressly excluded. *North Haven*, 456 U.S. at 521 (Title IX reaches discriminatory hiring under federally-funded education programs); *Davis*, 526 U.S. at 653 (Title IX reaches student-on-student sexual harassment). A person who complains about sex-based discrimination under a federally-funded education program and suffers adverse consequences that he or she would not otherwise have suffered has been "subjected to discrimination" based on sex within the meaning of Title IX.

In this setting, "discrimination" means different, less favorable treatment, and "on the basis of sex" means that the cause of the discriminatory treatment must be based on or rooted in sex differences or gender. Indeed, a retaliation claim under Title IX posits that the complainant was subjected to discrimination because he or she complained about sex-based inequalities. The concept of "discrimination on the basis of sex" is plainly broad enough to include discriminatory retaliation for complaining about sex-based differences in federally-funded education programs.

Critically, moreover, a narrow interpretation of discrimination to exclude reprisal discrimination is entirely inconsistent with the textual focus on the benefited class and would frustrate the statute's purpose of protecting that class. On numerous occasions, this Court has recognized that the victims of discrimination cannot be protected unless reprisal discrimination, too, is forbidden. This is particularly true where, as here, the victims of discrimination are employees of or participants in federally-funded programs who are not in relationships of equality with, respectively, the employer or administrator of those programs. (Indeed, under Title IX, participants are often elementary or secondary school students who plainly are even less able to identify and complain about discrimination than are their coaches and teachers.)[4] When

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[4] The court of appeals alternatively suggested that victims of sex-based discrimination who also suffer retaliation for complaining may have a cause of action for retaliation discrimination, while persons who complain about sex-based discrimination against others do not. Pet. App. 23a-24a. No such limit is suggested by the sweeping prohibition in the text, which requires only that the retaliation be "on the basis of sex," a prerequisite that is satisfied whether or not the complainant is also the victim of the initial act of discrimination. *See supra* at 8-9. And, as set forth *infra* at 18, this Court treated the white complainant in *Sullivan* as the victim of reprisal discrimination, though he complained about race discrimination against his black lessee. Finally, as noted in text, Congress's purposes of eliminating federal support for sex discrimination and protecting individuals from sex discrimination are undermined by the proposed

individuals know that challenging discriminatory conduct will result in detrimental treatment, the fear of retaliation "deter[s] victims of discrimination from complaining." *Robinson*, 519 U.S. at 346. Under such conditions, individuals who observe discrimination, who are expected to enforce or participate in discrimination, or who suffer discrimination have two choices: They can remain silent and accept discrimination or they can complain and accept punishment. For this reason, individuals must have unrestricted "access to statutory remedial mechanisms," if anti-discrimination statutes are to deter and remedy discrimination. *Id.* Cf. also *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("effective enforcement [of federal labor laws] could thus only be expected if employees felt free to approach officials with their grievances"); *id.* ("[f]or it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions") (citing *Holden* v. *Hardy*, 169 U.S. 366, 397 (1898)).

Put bluntly, if reprisal discrimination is not banned, enactment of an anti-discrimination statute will likely communicate that those who seek to enforce the statute will be punished and thus "give impetus to the perpetuation of [discrimination]." *Sullivan*, 396 U.S. at 237. As the Department of Justice has explained, "[a] right cannot exist in the absence of some credible and effective mechanism for its enforcement and enforcement cannot occur in the absence of a beneficiary class willing and able to assert the right." U.S. Dep't of Justice, *Title IX Legal Manual* 70 (Jan. 11, 2001), *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf ("*Title IX Legal Manual*").

Interpreting "discrimination" to include reprisal discrimination is, moreover, the only interpretation of Title IX

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limitation. Particularly in elementary and secondary education, teachers and coaches are far better situated than students to identify and seek a remedy for sex discrimination.

that comports with its statutory purposes. Title IX was enacted, *inter alia*, "to avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704. Thus, the private right of action must be consistent "with the statutory structure and purpose." *Gebser*, 524 U.S. at 284. Banning reprisal discrimination most effectively deters and remedies discrimination in federally-funded programs – indeed, protection against retaliation is necessary to vindicate the right to be free from discrimination.

First, and most obviously, prohibiting and punishing retaliation protects individuals by fostering early discovery and elimination of discriminatory policies and practices. Indeed, the Court has strongly induced persons subjected to sexual harassment to complain by holding that a cause of action for sexual harassment under Title IX will not lie "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Id.* at 290. Retaliation is always pernicious, but it is particularly so in this setting where retaliation effectively prevents complaints, undermining Title IX's deterrent purpose.

In addition, if the party whose decision-making is challenged as discriminatory may suppress complaints by terminating or punishing anyone who complains, that party has a much lower incentive to avoid discrimination. This, in turn, undermines the statute's purpose of ending federal funding of discriminatory practices. Effective deterrence requires the existence of a remedial mechanism that results in the imposition of liability on those with the power to discriminate or prevent discrimination. Retaliation constructively denies access to such a remedial mechanism, again undermining Title IX's deterrent purpose. Cf.

American Soc'y of Mech. Eng'rs, Inc. v. *Hydrolevel Corp.*, 456 U.S. 556, 572 (1982) ("the possibility of civil liability will inevitably be a powerful incentive for [an entity] to take those [preventive] steps"). Congress surely did not intend to create a federal right and a cause of action to enforce that right, and yet permit individuals to be punished for exercising those enforcement rights.[5]

B. Title IX's Prohibition Of "Discrimination" Has Received A Broad Interpretation.

In light of the foregoing, Title IX's prohibition of discrimination should be viewed as unambiguously banning retaliation discrimination. But if the statute is deemed ambiguous, the regulations implementing Title IX – which represent the interpretative judgment of the Department of Education ("DOE"), the agency "charged with responsibility for administering Title IX," *Cannon*, 441 U.S. at 706-08, and of the Department of Justice, the agency that "coordinate[s] the implementation and enforcement" of Title IX, see Exec.

[5] The opportunity to bring an administrative complaint alleging retaliation cannot appropriately protect enforcement of the right to be free from discrimination under Title IX and its analogues. As this Court recognized when construing Title IX in *Cannon*, the administrative enforcement mechanism will often fail to accomplish Congress's intention to provide individuals effective protection against discrimination. 441 U.S. at 704-06. Title IX's administrative complaint process (like the administrative complaint procedures for Title VI and the Rehabilitation Act) does not ensure that a complainant may activate and participate in the administrative process and does not guarantee any individualized relief for meritorious complaints. *Id.* at 706 n.41. In addition, in many circumstances, a shortage of administrative resources will result in a failure to act on individual complaints. *Id.* at 708 n.42. These concerns remain valid to this day. Reliance solely on an administrative enforcement mechanism for retaliation complaints is inconsistent with Congress's intent to provide individual citizens with effective protection against all aspects of discrimination; thus, the scope of the private right of action to enforce a statutory nondiscrimination mandate necessarily includes retaliation claims, to avoid fashioning the right in a way that is "at odds with the statutory structure and purpose." *Gebser*, 524 U.S. at 284.

Order No. 12,250, 45 Fed. Reg. 72,995, 72,997 (Nov. 2, 1980) – confirm § 901(a)'s prohibition of reprisal discrimination. See 34 C.F.R. § 100.7(e) (applied to Title IX under 34 C.F.R. § 106.71); *Title IX Legal Manual* at 70; U.S. Dep't of Justice, *Title VI Legal Manual* 65-66 (Jan. 11, 2001), *available at* http://www.usdoj.gov/crt/cor/coord/vimanual.pdf. The consistent views of the federal agencies that administer Title IX are entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (regulations); *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984); (executive order of agency charged with coordinating compliance).

If more reassurance were desired, it is noteworthy that, pursuant to the statute, Congress specifically reviewed the DOE's regulations, including the prohibition on reprisal discrimination, for consistency with congressional intent and left them undisturbed.[6] As a result of this review process *inter alia*, this Court has deferred to the interpretive judgments reflected in these regulations since their adoption in 1975. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 567-68 (1984) (according Title IX regulations particular deference as an interpretation of the statute), *superceded by statute on other grounds*, 20 U.S.C. § 1687; *id.* (Congress's failure to disapprove of the regulations "strongly implies that the

[6] *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) is not relevant to the issue presented. In that case, the Court held that because Title VI prohibits only intentional discrimination, regulations that prohibit discriminatory effects went beyond the statutory prohibition and thus could not be privately enforced. *Id.* at 285-86. This case, in contrast, requires "constru[ction of] the statute itself," *id.* at 284 – *viz.*, whether Title IX forbids reprisal discrimination. The DOE regulations that ban reprisal discrimination do not exceed the statutory prohibition; they simply reflect the administering agency's authoritative construction of Title IX.

regulations accurately reflect congressional intent"); *North Haven*, 456 U.S. at 533 n.24.[7]

If resort to legislative history were required, it would similarly confirm petitioner's (and the relevant federal agencies') reading of the text and purposes of Title IX. Petitioner has described in detail the congressional hearings that preceded Title IX's enactment, illustrating that these hearings included substantial testimony about retaliation and its consequences. See Pet. 17-18 (citing and describing relevant hearings). The legislative history and the legal context of the legislation's enactment – the overwhelming body of federal anti-discrimination laws containing implied or express prohibitions of reprisal discrimination – confirm the congressional intent to prohibit punishment of those who seek to enforce Title IX's anti-discrimination mandate.

Finally, this Court's precedents entirely fail to support respondent's crabbed construction of the word "discrimination" in Title IX. In *Davis*, the Court held that Title IX's private cause of action authorized a mother's claim that a school district violated Title IX when its deliberate indifference "subjected" her daughter to sexual harassment by another student in a setting subject to the school district's control. 526 U.S. at 653-54. And, in *Gebser*, the Court held that Title IX authorizes a private cause of action based on a school district's deliberate indifference to a teacher's known sexual harassment of a student. 524 U.S. at 290. In each of these cases, the school district was deemed to have discriminated or to have subjected others to discrimination within the meaning of Title IX *not because it engaged in acts of sexual harassment, but because it failed to respond*

[7] In addition, Title IX was amended by the Civil Rights Restoration Act of 1987; nothing in the amendment process suggests any congressional sentiment that the DOE's regulations contravened its intent with respect to reprisal discrimination. To the contrary, the regulation comports with Congress's unwavering approach to federal anti-discrimination law. *See infra* Part II.

adequately to known acts of sexual harassment by those within its control. Title VI's prohibition of discrimination has received the same interpretation in cases addressing race-based harassment. See *Bryant* v. *Independent Sch. Dist. No. I-38*, 334 F.3d 928, 933 (10th Cir. 2003) ("when administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be liable under § 601").

A fortiori, a school district or other federally-funded program discriminates or subjects others to discrimination when it responds to sex-based discrimination by *retaliating* against those who bring discrimination to the proper authority's attention. Whether reprisal is characterized as discrimination or as subjecting a person to discrimination, a school district with a duty to prevent sex discrimination in its schools violates Title IX when it retaliates against a person who notifies it of such conduct. See *Davis*, 526 U.S. at 643 ("whether viewed as 'discrimination' or "subject[ing]' students to discrimination, Title IX '[u]nquestionably . . . placed on [the school district] the duty not' to permit [sex discrimination] in its schools, and recipients violate Title IX's plain terms when they remain deliberately indifferent to [sexual harassment]") (omission and first two alterations in original) (citation omitted) (quoting *Franklin*, 503 U.S. at 75)[8]; *Gebser*, 524 U.S. at 290 (holding that a cause of action

[8] In dissenting from the holding that Title IX's implied private cause of action includes student-on-student sexual harassment, Justice Kennedy cited the following factors: (i) that the misconduct is committed by a third party, (ii) that the school district does not authorize the misconduct, (iii) that the acts of students cannot reasonably be attributed to the school as the acts of its agents or otherwise, and (iv) that the school district's control of students is complex and limited. *Davis*, 526 U.S. at 658-68. None of these factors apply to reprisal discrimination which is, by definition, the intentional act of the school district. *See also id.* at 683 (Kennedy, J.,

for sexual harassment under Title IX arises when an official with "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond").

The prohibition of reprisal discrimination is especially urgent in any setting where notice has been deemed a prerequisite to liability, and doubly urgent where the victims of discrimination are employees and students who are not in relationships of equality with the federally-funded program that discriminates and retaliates. How could a sensible statutory scheme allow a federally-funded program to retaliate against a participant or an employee for using a complaint process whose use is a prerequisite to that program's liability?

In light of the foregoing, respondent's contention that Title IX did not provide sufficient notice that it might be liable in damages for harm arising from reprisal discrimination is plainly wrong. This argument is based on this Court's Spending Clause jurisprudence, stating that a law enacted pursuant to the Spending Clause operates "in the nature of a contract," *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981), and that a federally-funded program accepts the terms of such a contract only if it is aware of the conditions imposed by Congress, *id.* at 17, 24-25. Cf. *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("the program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction"); *id.* at 665-66 (rejecting claim of insufficient notice where statute made clear that there are conditions on receipt of federal fund and noting that Congress is not required to "specifically identif[y] and proscrib[e]" each condition in the legislation).

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dissenting) ("a clear pattern of discriminatory enforcement of school rules could raise an inference that ~~the school~~ itself is discriminating").

As a matter of law, a federal-fund recipient who commits reprisal discrimination has notice that its conduct is forbidden. Respondent is not being held accountable or liable for discrimination committed by others; it is liable for its own discrimination. There is no "bar to liability where a funding recipient intentionally violates the statute." *Davis*, 526 U.S. at 642.[9] The text of Title IX provides more than sufficient notice that a federal-fund recipient may not use its authority in an education program receiving federal assistance to retaliate against those who complain about sex-based discrimination. Indeed, a "notice problem does not arise in a case such as this, in which intentional discrimination is alleged." *Franklin*, 503 U.S. at 74-75. See also *Davis*, 526 U.S. at 640. Thus, where, as here, the federally-funded program itself "causes" discrimination prohibited by Title IX, *Gebser*, 524 U.S. at 291, it cannot complain that Title IX did not provide adequate notice that its behavior was proscribed.

In sum, the statutory language, the context, and the purposes of Title IX clearly demonstrate that it prohibits reprisal discrimination. This meaning is confirmed by the uniform views of the administering federal agencies, the legislative history, and by this Court's construction of Title IX. "[M]eaning [is] imparted to [the words of the statute] by the mischief to be remedied." *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U.S. 216, 221 (1936). The "mischief to be remedied by Title IX" – as reflected in its text, history, and uniform construction and administration – cannot be

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[9] Precisely because it is intentional, the imposition of liability for reprisal discrimination on a federally-funded program is not remotely comparable to the imposition of direct liability for student-on-student sexual harassment or for the conduct of agents. *Cf. Davis*, 526 U.S. at 640-41 (rejecting direct liability for student-on-student sexual harassment); *Gebser*, 524 U.S. at 285-91 (rejecting the use of agency principles to impute school district liability for teacher misconduct and requiring deliberate indifference to known acts of harassment).

addressed unless Title IX's ban of discrimination includes reprisal discrimination.

II. PROTECTION FROM RETALIATION IS INTEGRAL TO FEDERAL ANTI-DISCRIMINATION LAW.

If traditional tools of statutory interpretation did not so clearly require an affirmative answer to the question presented, the Court would attempt to infer what the 1972 Congress that enacted Title IX would have done. See *Central Bank of Denver*, 511 U.S. at 178. In doing so, it is decisive that the major federal anti-discrimination statutes – including statutes with both implied and express private rights of action – prohibit reprisal discrimination. Indeed, the 1972 Congress knew that this Court had already established the fundamental principle that a right to be free of retaliation is inherent in the right to be free of discrimination. See *Cannon*, 441 U.S. at 696-98 (Congress is presumed to be aware of extant law).

A. Coverage of Reprisal Discrimination Is Uniformly Implied.

The Reconstruction Statutes, enacted more than a century before Title IX, reflect the Court's early recognition of the integral relationship between anti-discrimination law and a prohibition of retaliation for complaints. Decades ago, this Court held that 42 U.S.C. § 1982 – which forbids discrimination in connection with the sale or lease of property – created an implied private cause of action that includes claims based on reprisal discrimination. See *Sullivan* v. *Little Hunting Park*, 396 U.S. 229 (1969).

In that case, Sullivan, the white owner of property, leased a home to Freeman, an African-American; with that lease came a membership share in Little Hunting Park, a community park and playground facility for community residents. The Board of the Park refused to accept Sullivan's assignment of the lease to Freeman because Freeman was African-American and expelled Sullivan; Sullivan and Freeman sued. In finding

that Sullivan had a cause of action under § 1982, the Court explained,

> [i]f that sanction [expulsion for the advocacy of Freeman's cause], backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. [*Id.* at 237.]

See also *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545 (1990) (holding that a § 1981 claim for retaliatory discharge should have gone to a jury).

All federal circuits addressing whether the implied causes of action arising under §§ 1981 and 1982 prohibit retaliation have uniformly held that they do. In *Goff* v. *Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982), the court explained that § 1981 would be "meaningless if an employer could fire an employee for attempting to enforce his rights under the statute," and therefore that the "ability to seek enforcement and protection of one's right to be free of racial discrimination" is "an integral part of the right itself." *Id.* at 598. To rule otherwise, the court said, would "sanction[] further discrimination against those persons willing to risk their employer's vengeance by filing suits." *Id.* See also *Setser* v. *Novack Inv. Co.*, 638 F.2d 1137, 1146 (8th Cir.) (recognizing cause of action for retaliation under § 1981 because "a retaliatory response by an employer against such an applicant who genuinely believed in the merits of his or her complaint would inherently be in the nature of a racial situation"), *modified en banc on other grounds*, 657 F.2d 962 (8th Cir. 1981); *Choudhury* v. *Polytechnic Inst.*, 735 F.2d 38, 43 (2d Cir. 1984) ("an employee who is punished for seeking administrative or judicial relief . . . has failed to secure that right to equal treatment which constitutes the fundamental promise of § 1981"); *Hawkins* v. *1115 Legal Serv. Care*, 163 F.3d 684, 692-93 (2d Cir. 1998); *London* v. *Coopers & Lybrand*, 644 F.2d 811, 819 (9th Cir. 1981); *Miller* v.

Fairchild Indus., Inc., 885 F.2d 498, 503-04 (9th Cir. (1989); *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266, 1268-71 (6th Cir. 1977); *Andrews* v. *Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1409-13 (11th Cir. 1998); *Fiedler* v. *Marumsco Christian School*, 631 F.2d 1144, 1149 n.7 (4th Cir. 1980) (§ 1981 affords "a remedy for both the initial expulsion and the retaliatory expulsions"); *Buckman* v. *Montgomery County* (*In re Montgomery County*), 215 F.3d 367 (3d Cir. 2000); *Skinner* v. *Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988) (per curiam).[10]

Finally, like the implied claims arising under the Reconstruction Statutes, the implied claims arising under Title VI, the Rehabilitation Act, and, until this case, Title IX have uniformly been interpreted by the federal courts of appeals to bar reprisal discrimination. In *Peters* v. *Jenney*, 327 F.3d 307 (4th Cir. 2003), the court of appeals held that Title VI creates an implied claim for race-based reprisal discrimination because "retaliation serves as a means of implementing or actually engaging in intentional discrimination by encouraging such discrimination and removing or punishing those who oppose it or refuse to engage in it," and thus bears "a symbiotic and inseparable relationship to intentional racial discrimination."[11] *Id.* at 317-19.

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[10] There was a brief period after *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), in which lower courts held that § 1981 did not forbid retaliation discrimination unless it related to the making and enforcement of contracts; that period ended with the Civil Rights Restoration Act of 1991, 42 U.S.C. § 1981. This period casts no doubt on the integral connection between anti-discrimination laws and a ban on related retaliation; it simply limited the scope of permitted retaliation claims to the scope of the anti-discrimination statute at that particular time.

[11] Even before Title IX was enacted, the Fifth Circuit suggested that Title VI – the model for Title IX, *see Cannon* 441 U.S. at 694-96 – forbade race-based retaliation in *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 888-90 & n.110 (5th Cir. 1966), *aff'd on reh'g en banc*, 380 F.2d 385, 392-93 (5th Cir. 1967) (per curiam). In that case, the court approved the government's decision that school districts could be held responsible for protecting from retaliation students who exercised their right to attend predominantly white schools under freedom of choice plans adopted pursuant to Title VI.

The Rehabilitation Act of 1973, 29 U.S.C. § 794, has also been interpreted to authorize an implied claim for reprisal discrimination. See *Neudecker* v. *Boisclair Corp.*, 351 F.3d 361, 363-64 (8th Cir. 2003); *Weixel* v. *Board of Educ.*, 287 F.3d 138, 148-49 (2d Cir. 2002); *Gribcheck* v. *Runyon*, 245 F.3d 547, 550 (6th Cir. 2001); cf. *Weber* v. *Cranston Sch. Comm.*, 212 F.3d 41, 49 (1st Cir. 2000) (holding that a parent has standing to challenge a school's retaliatory action for her complaint about the school's treatment of her disabled child).[12] It is no wonder, then, that until the instant case, it was recognized that a cause of action for retaliation under Title IX is necessary for "'the orderly enforcement of the statute.'" *Lowrey*, 117 F.3d at 254 n.23. See also *Frazier* v. *Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002); *Murray* v. *New York Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995); *Preston* v. *Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994).

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[12] Although the Rehabilitation Act does not provide an express private cause of action for retaliation, both the judicial interpretations of the Act and the text of the law itself reinforce the conclusion that protection against retaliation is a component of the statute's protection against disability discrimination. In 1992, the Rehabilitation Act was amended to clarify that:

> [t]he standards used to determine whether [the] section has been violated in a complaint alleging employment discrimination . . . shall be the standards applied under title I of the Americans With Disabilities Act of 1990, (42 U.S.C. 12111 et seq.) and the provisions of sections 501 to 504 and 510 of the Americans With Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

29 U.S.C. § 794(d). The cited portions of the ADA include the ADA's prohibition of retaliation, 42 U.S.C. § 12203(a). Thus, the Rehabilitation Act now defines prohibited "discrimination" to include retaliation based on complaints of discrimination.

This Court and the federal courts of appeals have determined that an implied cause of action for discrimination necessarily includes a claim based on reprisal discrimination. That judgment with respect to the administration of federal anti-discrimination laws is entitled to great weight; and this consistent statutory interpretation should be applied to retaliation claims arising under Title IX.

B. Civil Rights Statutes Enforced By Express Causes of Action Uniformly Ban Reprisal Discrimination, Either Expressly Or By Implication.

Every major federal anti-discrimination statute that contains an express cause of action prohibits retaliation, including provisions enacted before and after Title IX. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); National Labor Relations Act, 29 U.S.C. § 158(a)(1); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3); Americans with Disabilities Act, 42 U.S.C. § 12203(a), (b); Age Discrimination in Employment Act, 29 U.S.C. § 623(d); Family and Medical Leave Act, 29 U.S.C. § 2615(a); Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140; Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(b); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1).[13]

Virtually all of these statutes include express prohibitions of reprisal discrimination, but not all. For example, the Title VII and ADEA provisions that ban unlawful discrimination in *federal* employment do not contain express prohibitions of

[13] Indeed, the language of major federal statutes makes clear that retaliation for complaints about discriminatory behavior is a type of discrimination. *See* 29 U.S.C. § 215(a)(3) (FLSA) (making it unlawful "to discharge or in any other manner discriminate against any employee" for filing a complaint); *id.* § 158(a)(4) (NLRA) (forbidding an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter").

retaliation. See 42 U.S.C. § 2000e-16; 29 U.S.C. § 633(a). A cause of action for retaliation against federal employees has nonetheless been inferred. Thus, with or without an express statement that reprisal discrimination is banned, the courts have interpreted federal anti-discrimination statutes with express causes of action to forbid retaliation. As the D.C. Circuit explained in the context of a federal employee's claim of age discrimination:

> Congress used unqualified language that encompasses a claim of retaliation because "analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor." Congress's failure to mention "retaliation" explicitly does not undermine its intended breadth of the provision. It is difficult to imagine how a workplace could be "free from discrimination based on age" if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee. [*Forman*, 271 F.3d at 296-97 (citations omitted).]

See also, *e.g.*, *Porter* v. *Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981) (Title VII's express cause of action for discrimination for federal employees includes retaliation); *White* v. *General Servs. Admin.*, 652 F.2d 913, 917 (9th Cir. 1981) (same); *Canino* v. *United States EEOC*, 707 F.2d 468, 472 (11th Cir. 1983) (same).[14]

This universal characteristic of anti-discrimination statutes with express private causes of action provides significant support to petitioner's interpretation of Title IX. Where, as

[14] Similarly, the text of the NLRA expressly bans employer retaliation against those who exercise their statutory rights, but does not expressly ban analogous union retaliation. This Court has nonetheless confirmed the National Labor Relations Board's determination that the NLRA forbids retaliation by *both* employers and unions. *See NLRB* v. *Industrial Union of Mar. & Shipbuilding Workers of Am., Local 22*, 391 U.S. 418 (1968).

here, the Court seeks to discover the intended scope of an implied cause of action, the Court examines the scope of related express causes of action and presumes that Congress intended an implied claim to have an analogous reach. For example, in *Central Bank of Denver*, the Court considered the bounds of an implied cause of action under § 10(b) of the Securities Act of 1934, specifically whether the implied cause of action included claims for aiding and abetting violators of § 10(b). The Court first observed that the federal securities laws create an "extensive scheme of civil liability," including express and implied rights of action as well as administrative enforcement proceedings. 511 U.S. at 171. The Court then "use[d] the express causes of action in the Securities Acts as the primary model for the § 10(b) action" because, had "Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the securities Acts." *Id.* at 178 (citing *Musick, Peeler*, 508 U.S. at 294-97). "Following that analysis," the Court found it absolutely critical that "*none* of the express causes of action in the 1934 Act further imposes liability on one who aids or abets a violation," and inferred that Congress did not intend to impose such liability in implied causes of action. *Id.* at 179 (emphasis added). See also *Musick, Peeler*, 508 U.S. at 297 ("consistency [with express causes of action] requires us to adopt a like contribution rule for the [implied] right of action existing under Rule 10b-5").

Here, as we have shown, all major federal anti-discrimination statutes with express private causes of actions – including those most closely related to Title IX, such as Title VII – prohibit reprisal discrimination. Critically, the list includes several statutes that had already been enacted when Title IX was passed. And, Congress's practice since the enactment of Title IX reflects an unbroken recognition of the interwoven nature of anti-discrimination laws and the prohibition of reprisal discrimination. Once Congress has

delineated the scope of "comparable express causes of action," it would be "anomalous to impute to Congress an intention to [significantly restrict] the [scope] for a judicially implied cause of action." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975). Like all express federal causes of action banning discrimination, Title IX should be interpreted to ban reprisal discrimination.

* * * *

The statutory ban of reprisals is essential to protection of the underlying right to be free of discrimination, particularly where the victims are in inherently unequal relationships because the actors engaged in discrimination are adults, while the victims are minors, or are employers, while the victims are employees. Any contrary interpretation of Title IX and its analogues would cause broad harm to individuals whose rights to be free from unlawful discrimination are safeguarded by those federal civil rights laws. Indeed, our constitutional history and principles affirm that protection from retaliation for the exercise of fundamental federal rights is essential to the protection of the rights themselves. Congress's determination that federal anti-discrimination statutes, including Title IX, prohibit reprisal discrimination simply reflects a fundamental background principle of our constitutional system – that the rights of free speech and petition are "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers of Am., Dist. 12* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967), because they ensure enforcement of all other rights.

Civil rights laws extend the guarantees of public citizenship to new groups and in new settings. Thus, Title IX extends the promise of equal citizenship, free from discrimination on the basis of sex, to all individuals participating in or employed by federally-funded educational activities and provides a private right of action for enforcement of this promise. Just as the Constitution recognizes that the right to petition for redress of grievances includes a right to do so without retaliation,

Congress has recognized that the right to be free of discrimination includes the right to complain about unlawful discrimination without reprisal discrimination.

CONCLUSION

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

LCCR COALITION MEMBERS – JULY 2004

A. Philip Randolph Institute

American Association of People with Disabilities (AAPD)

AARP

ADA Watch

Affiliated Leadership League of and for the Blind of America

African Methodist Episcopal Church

African Methodist Episcopal Zion Church

Alaska Federation of Natives

Alaska Inter-Tribal Council

Alliance for Retired Americans

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American Association for Affirmative Action

American Association of People with Disabilities

American Association of University Women

American Baptist Churches, U.S.A. – National Ministries

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federation of Government Employees, AFL-CIO

American Federation of Labor – Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

American Friends Service Committee

American Jewish Committee

American Jewish Congress

American Nurses Association

American Postal Workers Union, AFL-CIO

American Society for Public Administration

American Speech-Language-Hearing Association

American-Arab Anti-Discrimination Committee

Americans for Democratic Action

Anti-Defamation League of B'nai B'rith

Asian Pacific American Labor Alliance

Associated Actors and Artists of America – AFL-CIO

Association for Education and Rehabilitation of the Blind and Visually Impaired

Association of Junior Leagues International Inc.

Brennan Center for Justice at New York University School of Law

Building & Construction Trades Department – AFL-CIO

Catholic Charities, USA

Center for Community Change

Center for Women Policy Studies

Children's Defense Fund

Church of the Brethren – World Ministries Commission

Church Women United

Coalition of Black Trade Unionists

Common Cause

Communications Workers of America

Community Transportation Association of America

Congress of National Black Churches

Delta Sigma Theta Sorority, Inc.

Disability Rights Education and Defense Fund

Division of Homeland Ministries – Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Episcopal Church – Public Affairs Office

Evangelical Lutheran Church in America

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

GMP International Union

Global Rights

Hadassah, The Women's Zionist Organization of America

Hotel and Restaurant Employees and Bartenders International Union

Human Rights Campaign

Human Rights First

Improved Benevolent and Protective Order of Elks of the World

Industrial Union Department – AFL-CIO

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO

International Union, UAW

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Community Centers Association

Jewish Council for Public Affairs

Jewish Labor Committee

Jewish Women International

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity, Incorporated

Labor Council for Latin American Advancement

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National Low Income Housing Coalition

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IN THE

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BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN VOLLEYBALL COACHES ASSOCIATION, NATIONAL FASTPITCH COACHES ASSOCIATION, INTERCOLLEGIATE WOMEN'S LACROSSE COACHES ASSOCIATION, AND WOMEN'S BASKETBALL COACHES ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

This brief *amicus curiae* is submitted, with the consent of the parties, on behalf of the National Education Association

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

(NEA), a nationwide organization with more than 2.7 million members, almost 2.5 million of whom work as teachers, professors, coaches or administrators in our nation's schools and universities; the American Association of University Professors, a higher education organization made up of approximately 45,000 faculty members in all academic disciplines; the American Volleyball Coaches Association, a national organization of approximately 3,200 high school, college and club coaches; the National Fastpitch Coaches Association, a national organization of approximately 4,200 club, secondary and higher education coaches; the Intercollegiate Women's Lacrosse Coaches Association, a nationwide coaches' organization with approximately 250 institutional members, primarily employed at the university level; and the Women's Basketball Coaches Association, a national organization of approximately 4,500 high school, youth sport, and college professional coaches. All of these organizations are committed to ensuring that Title IX of the Education Amendments of 1972 is fully enforced, and they submit this brief to show why that enforcement depends on ensuring that teachers, professors, coaches, school administrators and students are protected from retaliation for reporting Title IX violations or for supporting Title IX claims.

SUMMARY OF ARGUMENT

Title IX's protections are broad, providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Those broad protections long have been interpreted by the relevant administrative authorities, with Congress' approval, to prohibit retaliation against persons who

object to sex discrimination in educational programs receiving Federal financial assistance.[2]

Proceeding from an analysis of the kinds of evidence that must be adduced to establish a Title IX violation, and of the realities of Title IX enforcement, this brief will show that, if Congress' prohibition against sex discrimination in federally-supported educational programs is not to be reduced to an empty promise, the longstanding interpretation of the statute as forbidding retaliation against those who make complaints or who otherwise assist in enforcement must be upheld. And we will show that this is particularly true in the case of teachers, professors, coaches and school administrators who are at risk of retaliation when they expose violations of Title IX.

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[2] Title IX has been interpreted to reach discrimination against individuals who raise or support Title IX complaints since 1975, 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)) (current codification of Title IX regulation first appearing in Nondiscrimination on the Basis of Sex in Education Programs and Activities, 44 Fed. Reg. 24127, 24144 (June 4, 1975)), and Congress has been fully apprised of that interpretation by virtue of the fact that that regulation was lodged with Congress for 45 days time prior to taking effect. *See* 44 Fed. Reg. at 24128. That Congress did not take any action to prevent the regulation from taking effect, and has taken no action to remove retaliation as an action prohibited by Title IX, makes this case an appropriate one in which to invoke the rule that where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States v. Rutherford*, 442 U.S. 544, 554, n.10 (1979) (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940)). *See also Cannon v. University of Chicago*, 441 U.S. 677, 702-03 (1979); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

ARGUMENT

I. EDUCATORS PLAY AN ESSENTIAL ROLE IN THE ENFORCEMENT OF TITLE IX, WHICH WOULD BE STIFLED IF EDUCATORS COULD BE SUBJECTED TO RETALIATION WITHOUT REDRESS WHEN THEY SEEK TO CORRECT VIOLATIONS OF THE STATUTE

A. The Athletics Arena

The importance of protecting educators from retaliation when they take steps to expose and correct violations of Title IX is readily apparent in the athletic arena in which this case arose. That is so because the enforcement of Title IX in athletics at the collegiate level, and increasingly at the elementary and secondary school levels as well, depends on specific and detailed knowledge regarding a school's athletic program that generally is available to educators—in particular coaches and athletic administrators—but not to students. Consequently, in most situations, if coaches and administrators do not take steps to insist that violations of Title IX be corrected, the violations will go undetected and unremedied.

i. There are three main varieties of Title IX claims in the athletics arena—claims of unequal treatment of female teams and/or athletes, claims of unequal accommodation of female students' athletic interests and abilities, and claims of unequal financial support (*i.e.*, scholarships) for female athletes. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979). Proof of all three types of claims depends on a wealth of information about the athletic program of a school that coaches and athletic administrators are uniquely situated to possess and comprehend.

For example, the type of claim that Petitioner Jackson attempted to raise below was a claim of unequal treatment of a girls' basketball team. Specifically, Jackson claimed "that the girls' [basketball] team was denied equal funding and

equal access to sports facilities and equipment" (Cert. Pet. at 3a). In particular, Jackson was aware that the girls were "forced to practice in an older, unheated gym or wait until after the boys were done practicing in the newer gym," and that "boys got a share of concessions and ticket money while girls did not."[3] Although the timing and location of the two teams' practice sessions might be readily apparent to students, the unequal manner in which financial support was divided between the teams is something that Jackson, as a member of the school athletics staff, was uniquely situated to know and to bring to light. Had he not come forward, in all likelihood the issue would not have been raised and the alleged inequality in funding for the girls and boys teams would have gone unremarked and unaddressed.

In this respect the claim in this case is typical of Title IX unequal treatment claims. Proof of such a Title IX claim usually requires a wealth of factual detail regarding the entire scope and nature of support a school provides to its teams and athletes. Since 1979, the enforcement agencies have taken the position that Title IX does not require exact equality in the treatment of male and female athletes, but rather "equivalence" in the opportunities and support that are provided to male and female athletes across the entire athletic program of a school. *See* 44 Fed. Reg. at 71415-17.[4] Determining whether such "equivalence" exists is an extremely fact-intensive inquiry that requires, under the governing policy guidance, consideration of no less than 55 different factors, *id.*, including a comparison of such matters as the compensation, qualifications, and working conditions of the

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[3] John Zenor, *Alabama Title IX Retaliation Case Goes to Supreme Court*, Associated Press State & Local Wire (June 12, 2004).

[4] This 1979 Policy Guidance on Athletics was promulgated by the former Department of Health, Education and Welfare but has since been followed by Department of Education, and has been treated by courts as an agency interpretation of the statute entitled to great deference. *See, e.g., Cohen v. Brown University*, 991 F.2d 888, 896-97 (1st Cir. 1993).

coaches provided to the various teams, *id.* at 71416, the quality, amount, suitability and maintenance of the equipment so provided, *id.*, the number and scheduling of games and practice seasons for the various teams, *id.*, the travel accommodations, transport and meals provided to teams while away from home, *id.*, the quality, availability, maintenance and exclusivity of locker rooms, practice and competitive facilities, *id.* at 71417, the medical personnel, assistance and insurance coverage available to team members, *id.*, the availability and quality of conditioning and weight training facilities as well as athletic trainers, *id.*, the availability and quality of public relations spokespeople for the teams and the quantity and quality of promotional materials about the teams, *id.*, the financial and other resources made available to coaches for recruitment purposes, and the amount of administrative, secretarial and clerical assistance provided to the men's and women's athletic programs, *id.* Although this fact-specific inquiry was promulgated specifically to address Title IX compliance at the collegiate level, a similar program-wide inquiry is used to evaluate equity in sports at the elementary and secondary school level. *See, e.g.*, Letter of J. Palomino, Regional Civil Rights Director, to K. Gilyard, Counsel for Jurupa Unified Sch. Dist. at 3 (dated Feb. 7, 1995) (*available at* http://www.ed.gov.about/offices/list/ocr/letters/jurupa.html); *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 289-93 (2d Cir. 2004).[5]

[5] The only circumstances in which such a multifaceted program-wide inquiry is not required are where the disparities in the support provided to male and female athletes "are substantial enough in and of themselves to deny equality of athletic opportunity" regardless of the nature of the school's overall athletic program. 44 Fed. Reg. at 71418. *See, e.g.*, *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 856 (W.D. Mich. 2001) (requiring girls' basketball, soccer, volleyball, swimming and diving, and tennis teams to play off-season resulted in such significant harms to girls' teams and athletes as to violate Title IX in itself), *aff'd on other grounds*, No. 02-1127, 2004 U.S. App. LEXIS 15437 (6th Cir. July 27, 2004), *petition for rehearing en banc filed* (6th Cir. Aug. 9, 2004).

Claims of unequal accommodation of female students' athletic interests and abilities, and claims of unequal financial support for female athletes, are similarly dependent on facts uniquely within the purview of athletic program staff. An unequal accommodation claim depends in most instances on evidence that there is sufficient interest and ability among female students to support additional teams and that there is a reasonable expectation of competitive opportunities for such new teams, 44 Fed. Reg. at 71417-18—all points on which the views of athletic staff, and information that is uniquely available to them, are crucial.[6] An unequal financial support claim typically depends on evidence that female athletes in the school receive less of the available scholarship dollars

[6] The Education Department has stated that a school can avoid detailed consideration of whether it "fully and effectively accommodates the interests and abilities of the underrepresented sex" by showing either (i) that "intercollegiate level participation opportunities [in sports] for male and female students are provided in numbers substantially proportionate to their respective enrollments," or (ii) that the school "can show a history and continuing practice of [athletic] program expansion which is demonstrably responsive to the developing interests and abilities of the members of [the sex that is underrepresented among intercollegiate athletes]." Education Department, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* at 1, 9 (Jan. 16, 1996) (*available at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html). *See also* 44 Fed. Reg. at 71418. As a practical matter, however, most schools cannot make out either showing and therefore must make the more detailed showing set forth above to comply with Title IX. Catherine Pieronek, *Title IX and Intercollegiate Athletics in the Federal Appellate Courts: Myth v. Reality*, 27 J.C. & U.L. 447, 459-60 (Fall 2000) (explaining that neither prong of the test is a realistic possibility for most institutions to meet). And, in any event, the alternative tests that are theoretically available also involve factual matters—such as how the athletic program has expanded over time in response to the interests and abilities of female students—which are much more likely to be known to coaches and administrators than to students.

than do male athletes—again, a factual matter about which staff are much more likely to have information than are students. *See* 34 C.F.R. 106.37(c). *See also* 44 Fed. Reg. at 71415.

ii. From what we have shown to this point, it is clear that coaches and administrators, with their unique access to relevant information concerning their schools' athletic programs—coupled with experience and training which enables them to synthesize such information and to put it in context—are in a position to identify Title IX violations that may go unperceived by students. In addition, when students do perceive a violation, they may choose not to challenge it, either because they cannot expect to receive any direct benefit from a challenge, or because of fear that they will suffer retaliation that will harm their athletic aspirations, or both.[7] Coaches and administrators, with their longer-term involvement in a school's athletic program, often have a greater willingness to insist that violations not be ignored. It therefore comes as no surprise that athletic program staff are often the impetus for, or provide key evidence in, administrative efforts to enforce Title IX.

The reported cases indicate that athletic program staff often initiate such administrative complaints themselves.[8] More-

[7] Consider, for example, a female student who is selected for a high school varsity team as a junior or senior, and who learns that the team is not treated equally with the boys' team. If the student were to complain, it is likely that she would have graduated before the complaint was resolved. In the meantime, if the student's complaint were to cause school authorities to give her worse recommendations for college, or to reduce her playing time or to retaliate in other ways, the student's college aspirations might be set back in a way that could never be remedied. With so much to lose and so little to gain, it is only to be expected that many students will choose not to speak out against Title IX violations.

[8] *See, e.g., Lendo v. Garrett County Bd. of Educ.*, 820 F.2d 1365, 1366 n.5 (4th Cir. 1987); *Brusseau v. Iona College*, No. 02 Civ. 1372, 2002 U.S. Dist. LEXIS 15413, *5 (S.D.N.Y. Aug. 21, 2002); *Bowers v. Baylor University*, 862 F. Supp. 142, 143 (W.D. Tex. 1994); *O'Connor v. Peru State College*, 605 F. Supp. 753, 758 (D. Neb. 1985), *aff'd*, 781 F.2d 632 (8th Cir. 1986).

over, once a complaint is brought, appropriate investigation of the claim, the nature of which is detailed at length in the Education Department's 125 page *Title IX Athletics Investigator's Manual* (1990) ("Manual"), is heavily dependent upon the participation of athletic program staff in the process.[9]

For example, an agency investigation of a complaint of unequal treatment involves interviews of the relevant athletic administrators and coaches to determine, *inter alia*, precisely what equipment and supplies are provided to each team and in what respects, if any, those items fall short (*e.g.*, is the equipment "regulation"), Manual at 30-31; which teams have priority for scheduling purposes, what competitive opportunities are provided, whether sufficient practice time is provided, whether practices and games are scheduled at convenient times and whether the teams are given the opportunity to compete at regional and state levels, Manual at 36-37; what travel, housing and meal arrangements are made for teams while they are playing away from home, Manual at 44-45; the background and experience of each coach, his or her duties, responsibilities and compensation, the number of athletes each coaches, and the number of student assistant coaches each is provided, Manual at 57-58; the facilities and locker room used by each team, how well those facilities are maintained, whether the facilities are regulation and whether the teams have exclusive or non-exclusive use of the particu-

[9] The manual is available at http://www1.ncaa.org/membership/ed_outreach/gender_equity/index.html and is relied upon not just by the Department of Education's Office of Civil Rights in conducting Title IX investigations but by courts adjudicating Title IX enforcement actions brought by private parties. *See, e.g., McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 293 n.14 (2d Cir. 2004).

lar facility or locker-room, Manual at 65-66, 74-75; the number and identity of sports public relations personnel assigned to each team and the extent to which such personnel are available to promote the team (*e.g.*, do they travel with the team, do they keep statistics on the team and/or individual players and what steps do they take to promote the team and/or its members), Manual at 87; and (where applicable) the recruitment budget for each team including the number of subsidized visits to campus for which each team pays, the number of recruiters for each team, the recruitment area covered for each team, the number of recruitment trips made, and the methods of recruitment used, Manual at 98-99.

Similarly, an investigation of a claim that a school is not effectively accommodating the interests and abilities of female or male students depends on interviewing coaches and athletic administrators to determine whether they believe the interests and abilities of both sexes are being fully and effectively accommodated, including whether existing teams are provided with the opportunity to compete at an appropriate level as well as whether students have expressed an interest in participating in other sports not offered by the school. Manual at 23-24. So too, the investigation of a claim of unequal provision of athletic scholarships requires interviewing coaches and athletic administrators to determine what funds are actually used to provide scholarships to participants on their teams, whether their teams expend more or less than the amount budgeted for financial assistance for athletes, and whether their teams expend up to the maximum scholarship amount allowed by their regional conference or national athletics organization. Manual at 16-17.

The key role athletic program staff play in Title IX enforcement is evidenced not only at the administrative level but in judicial proceedings as well. Successful challenges to a school's failure to accommodate the athletic interests and abilities of female students invariably have depended on

testimony by coaches and/or athletic directors that female students at the school have the ability and interest to compete at a certain level in a particular sport yet are not being provided with the opportunity to do so. For example, in a leading Title IX accommodation case, the lower court granted a preliminary injunction mandating that Brown University not downgrade its women's varsity volleyball and gymnastics teams from university-funded status to donor-funded status based in critical part on the testimony of a former athletic director, two current coaches and two current associate athletic directors that the change in team status would eliminate the ability of the teams to recruit talented players and compete at the varsity level. *Cohen v. Brown University*, 809 F. Supp. 978, 992-93, 997-98 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). And, in subsequently granting judgment to the plaintiffs after a bench trial, the district court gave particular weight to the testimony of current coaches and the former athletic director that the levels of support Brown provided to its female teams were inadequate to maintain those teams' competitiveness and to allow one of the teams to compete up to the level of its ability. *Cohen v. Brown University*, 879 F. Supp. 185, 190, 201-02, 211-12 (D.R.I. 1995), *aff'd in relevant part*, 101 F.3d 155 (1st Cir. 1996).[10] Similar testimony has played a pivotal role in other successful challenges to a college's failure to accommodate the sports interests and abilities of its female students.[11]

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[10] As the first major decision by an appellate court regarding a Title IX challenge to a college athletic program, the reasoning and analysis employed in the *Brown* case has proven to be extremely influential in the development of Title IX law. *See* Pieronek, *supra* at 514-15 (describing the decision as a "watershed case" of "seminal" importance).

[11] *See, e.g., Pederson v. Louisiana State University*, 912 F. Supp. 892, 902 (M.D. La. 1996) (ruling for plaintiffs on Title IX failure to accommodate claim based in part on assistant athletic director's testimony that university knew female students were interested in more sports opportunities than were offered), *aff'd in relevant part*, 213 F.3d 858 (5th

In lawsuits raising unequal treatment claims, the role played by coaches is, if anything, even more pronounced. Most of those cases are brought by coaches themselves, to protect not only the coaches' interests but the interests of the members of the teams they coach. *See, e.g., Arceneaux v. Vanderbilt University*, 25 Fed. Appx. 345, No. 00-5691, 2001 U.S. App. LEXIS 27598 (6th Cir. Dec. 28, 2001) (women's track and cross country coach alleged that he was paid less than similarly situated coaches of men's teams and that the women's teams he coached were provided with inadequate resources, equipment and uniforms); *Blalock v. Dale County Bd. of Educ.*, 84 F. Supp. 2d 1291, 1295-96 (M.D. Ala. 1999) (teacher and coach brought suit claiming she was paid less to coach girls' teams and that "[she] and her teams were treated as inferior to the male teams with respect to sports equipment, locker rooms, restroom facilities, uniforms, food allowances, and hotel accommodations at away games"); *Price v. Wilton Public Sch. Dist.*, No. 3:97 CV 02218, 1998 U.S. Dist. LEXIS 23138 (D. Conn. Sept. 23, 1998) (coach brought suit on behalf of himself, his minor daughter and her teammates alleging that girls teams had "poorer quality uniforms," an "inferior locker room and other facilities," "less access to coaches," and "less practice space and practice time"); *Tyler v. Howard Univ.*, No. 91-CA-11239 (D.C. Sup. Ct. June 24, 1993) (women's basketball coach sued under Title IX based on fact she was paid half what the men's basketball coach was paid and that her team was staffed inadequately and given inadequate locker and office space) (described in Pieronek, *supra* at n.26).

Cir. 2000); *Favia v. Indiana University of Pennsylvania.*, 812 F. Supp. 578, 581-82 (W.D. Pa.) (relying on testimony of coach and former associate athletic director regarding significant inequities in support for female teams and athletes to hold that that the university had failed to accommodate the interests and abilities of women students), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

These unequal treatment cases reflect the reality that coaches are closely identified with their teams, and view their teams' successes and failures as their own (a view shared by the educational institutions for which they work, which often make retention and salary decisions based on a coach's win/loss record). As one coach put it when confronted with a question at her deposition as to whether inequities in how her team was treated affected her; "How can you separate the two? The program is me. . . . [H]ow can you separate them to say what actually happened to me as opposed to what happened to them? I am them. They are me." *Lamb-Bowman v. Delaware State University*, 152 F. Supp. 2d 553, 557 (D. Del. 2001), *aff'd*, 39 Fed. Appx. 748 (3d Cir. 2002). The inextricable relationship between how coaches are treated and how their teams are treated means, as a practical matter, that when coaches raise Title IX claims they often are able to secure significant relief not just for themselves but for their teams and athletes. *See, e.g., Goins v. Hitchcock I.S.D.*, 191 F. Supp. 2d 860, 865 nn.2-3 (S.D. Tex. 2002) (explaining that initial Title IX suit by women's basketball and volleyball coach was settled in a manner that addressed her complaints of significant inequities in funding and support for high school female athletes and teams and created a Title IX committee to consider and resolve such matters on an ongoing basis), *aff'd*, 65 Fed. Appx. 508 (5th Cir. 2003).[12]

Finally, even where no administrative complaint has been lodged or lawsuit filed—which is the case with the vast majority of efforts to correct violations of Title IX—coaches

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[12] *See also O'Connor*, 605 F. Supp. at 757, 761 (female coach's complaints that equipment and uniform for women's teams "were in very poor condition, both in quality and quantity," that men's visiting teams were allowed to use women's locker-room often resulting in conflicts, and that women's basketball team practiced on a "hazardous" court ringed tightly with bleachers, prompted subsequent administrative investigation and correction of those inequities).

play a central role in spurring voluntary efforts to bring athletic programs into compliance with the statute. Several Title IX retaliation cases reflect efforts by coaches or other athletic program staff to bring their school's athletic program into compliance with Title IX either by way of their participation on committees or task forces,[13] or by advocating increased funding for female athletes and/or teams during the annual budget process,[14] or by protesting gender inequities as they encounter them over the course of their careers.[15]

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[13] *See, e.g., Lowrey v. Texas A & M University Sys.*, 117 F.3d 242, 244 (5th Cir. 1997) (former women's basketball coach served as member of special task force on gender equity that identified violations of Title VI and XI by the university); *Oregon Employee Cannot Sue Under Federal Education Act*, Oregon Employment Law Letter, Feb. 1997 (reporting that assistant director of athletics was terminated after initiating a review of Linfield College's compliance with Title IX that found Title IX violations).

[14] *See Atkinson v. Lafayette College*, No. 01-CV-2141, 2002 U.S. Dist. LEXIS 1432, ** 2-3 (E.D. Pa. Jan. 30, 2002), *appeal docketed*, 03-3426 (3d Cir. Aug. 20, 2003), *stayed*, (June 22, 2004) (pending decision in this case).

[15] *See Lowrey v. Texas A & M University Sys.*, 11 F. Supp. 2d 895, 900 (S.D. Tex. 1998) (former women's basketball coach complained throughout her career about inadequate facilities for her team including the fact that her team had to share its locker-room with visiting men's team and the fact that the locker room consisted of one toilet, one sink, no dressing tables, no outlets, no storage, inadequate lockers and, at least initially, four urinals); *Clay v. Neosho County Cmty. College*, 905 F. Supp. 1488, 1492-93 (D. Kan. 1995) (basketball coach raised gender equity issues with Dean of Student Activities, at NCAA scholarship meeting, in discussions with college Athletic Director and other coaches, and in complaint to college Title IX coordinator about budget issues); *Lamb-Bowman*, 152 F. Supp. 2d at 554-55 (women's basketball coach complained over course of eight years about inequities in treatment of women's teams and athletes); *Blalock*, 84 F. Supp. 2d at 1296 (coach raised gender equity issues so many times over the course of her twenty years of employment with school that athletic director complained "he

B. Beyond Athletics in the Academy

Educators play an indispensable role in enforcing the mandates of Title IX not only in the athletics arena, but in all facets of our schools' and universities' educational programs including admissions, testing, career education, math and science. Beyond the role educators play in ensuring that these programs do not discriminate based on sex, educators in all fields and at all levels of instruction play a critical role in ensuring that when students are harassed by another student or faculty member in a manner prohibited by Title IX, such harassment comes to the attention of the appropriate authorities and is suitably addressed.

That role is particularly apparent in cases where the victims of harassment or abuse are young students who cannot reasonably be expected to know that what is happening to them is unlawful and can and should be stopped. In such cases, teachers are often the only adult witnesses to the offensive conduct, and it is only through their actions that the conduct is brought to light and addressed. For example, in *Wilson v. Beaumont Independent School District*, 144 F. Supp. 2d 690, 691 (E.D. Tex. 2001), the teacher of two mentally retarded twelve year old boys raised a concern as to whether one had sexually assaulted the other based on her personal observation of their interaction; as a result of the teacher's action, and her action alone, the incident was brought to light and addressed. So too in *Phillips v. Hood River School District*, No. CV 98-1161-AS, 1999 WL 562682, at *1 (D. Ore. Apr. 22, 1999), a teacher was the sole person who brought to light the fact "that a group of three boys were sexually harassing a female student during the school day."

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was sick and tired of [her] comparing everything that . . . the boys had to what the girls had") (ellipsis in original).

If teachers are not encouraged to report harassment of young students when they observe it, not only will the harassment continue, but other students may be led to think that such conduct is acceptable. *See* HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS at 12 (1993) (reporting that 37% of students who admitted engaging in harassment gave as a reason "It's just part of school life/a lot of people do it/it's no big deal").

Even in the case of more mature students, teachers and professors continue to play an invaluable role in ensuring that incidents of sexual harassment are brought forward and dealt with appropriately. Students often refrain from reporting harassment they experience due to both "embarrassment and fear." Andrea Giampetro-Meyer *et al.*, *Sexual Harassment in Schools*, 12 Wis. Women's L.J. 301, 304 (1997). A study by the American Association of University Women Educational Foundation found that fewer than one in four students who have been harassed told a parent or other family member and that fewer than one in ten students told a teacher. HOSTILE HALLWAYS at 24.[16]

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[16] Even many adults refrain from reporting harassment due to similar concerns. *See* GAO Report to Congressional Requesters, *Gender Issues—Women's Participation in the Sciences Has Increased, But Agencies Need to Do More to Ensure Compliance with Title IX* (July 2004, GAO-04-639) at 11 (Scientists and students "suggested they would be unlikely to file a complaint for fear of retribution from supervisors or colleagues. For example, some women faculty members we spoke with said that although they perceive that discrimination exists in their department, filing a complaint could hinder their ability to attain tenure."); *Sex Discrimination: DEA's Handling of Sexual Harassment and Other Complaints* (Letter Report, March 4, 1994, GAO/OSI-94-10) ("Employees at the Drug Enforcement Administration (DEA) are reluctant to use the agency's complaint process to deal with sexual harassment because they fear reprisal from managers and because they believe that investigators lack objectivity, sensitivity, and confidence."); *Equal Employment Opportunity: NIH's Handling of Alleged Sexual Harassment and Sex Discrimination Matters* (GAO Letter Report, Sept. 29, 1995, GAO/GGD-95-192) at

Given the reality that victims of sexual harassment are unlikely to report the harassment, it is particularly important that teachers and professors be encouraged to voice such complaints on behalf of their students. As the Education Department has recognized, teachers and professors are "in the best position to prevent harassment and to lessen the harm to students, if, despite their best efforts, harassment occurs." Revised Sexual Harassment Guidance, 65 Fed. Reg. 66091, 66098 (Nov. 2, 2000); *see also* 65 Fed. Reg. at 66098 ("school personnel are in the best position to ensure a safe and nondiscriminatory learning environment for every student.").

C. The Importance of Protecting from Retaliation Educators Who Step Forward to Enforce Title IX

The crucial role played by educators in enforcing Title IX as set forth above would be significantly dampened if educators were not assured that they are protected against retaliation for bringing such concerns to light, whether by speaking out to school officials, by reporting violations to enforcement authorities, by participating in administrative investigations, or by participating in court proceedings as a party or witness. The unique ability of educators to witness and report Title IX violations is potentially countered by a unique vulnerability to retaliation by the educational institutions for which they work, which have the authority

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4 ("[S]ome of the employees who chose not to file complaints believed the situation would not be kept confidential, the harasser would not be punished, filing a complaint would not be worth the time or cost, and/or that they would be retaliated against."); *DOD Service Academies: Update on Extent of Sexual Harassment* (Letter Report Mar. 31, 1995, GAO/NSIAD-95-58) at Appendix I:5 ("Given that there has been no apparent change in the perceptions of women regarding the negative consequences of reporting harassment, it is likely that sexual harassment will continue to be underreported.").

and ability not only to dismiss an educator from employment but to effectively end his or her career by doing so.

That reality is demonstrated most concretely by the fact that educators bring the vast majority of Title IX retaliation cases: a full 70% of the reported federal cases raising such claims are brought by educators themselves rather than by students.[17] These cases prove the point that educators put their very livelihoods at risk by standing up for Titie IX enforcement. Educators have been fired for challenging the unequal treatment of women and girl athletes[18] and for pursuing sexual harassment complaints on behalf of their students;[19] educators report being physically threatened for

[17] As determined by a review of federal court Title IX retaliation cases reported by LEXIS as of August 14, 2004.

[18] *See Kemether v. Pennsylvania Interscholastic Athletic Ass'n*, No. 96-6986, 1999 U.S. Dist. LEXIS 17326, at **70-71 (E.D. Pa. Nov. 8, 1999) (interscholastic athletic association refused to employ referee because she had complained about the fact that women were not allowed to referee boy's games); *Clay*, 905 F. Supp. at 1494-96 (denying defendant's motion for summary judgment on claim that plaintiff women's basketball coach's contract was not renewed because he complained about inequitable support for female athletes and teams); *Bowers*, 862 F. Supp. at 143-44 (denying motion to dismiss claim that women's basketball coach was dismissed for complaining about the disparate treatment of the men's and women's basketball teams). *See also* NCAA, *A Guide to Recent Developments in Title IX Litigation* (Feb. 15, 2000) at 18 (reporting that former women's volleyball coach at California State University, Fullerton prevailed at trial on his claim that he was terminated in retaliation for his support of a successful Title IX case against the university, and reporting that the former women's volleyball coach at San Diego State University prevailed on a similar claim).

[19] *See Holt v. Lewis*, 955 F. Supp. 1385, 1386 (N.D. Ala. 1995) (professor allegedly forced to resign because he had gone to a university trustee about a student's discrimination complaint), *aff'd*, 109 F.3d 771 (11th Cir. 1997) (unpublished table decision); *Nelson v. University of Me. Sys.*, 923 F. Supp. 275, 284 (D. Me. 1996) (professor came forward with sufficient evidence to withstand summary judgment on claim that he was

raising concerns about gender inequities in their school's sports program,[20] being told they will "never work" again if they persist in raising such complaints,[21] and having their team eliminated altogether after they extended a scholarship offer to a female athlete.[22] In light of that record, there can be no doubt that concerns about retaliation for raising Title IX issues are real and well-grounded among educators and that the Title IX anti-retaliation protections serve an important purpose in protecting educators who step forward to enforce Title IX.

II. CONGRESS' INTENT THAT TITLE IX "PROVIDE INDIVIDUAL CITIZENS EFFECTIVE PROTECTION" WOULD BE UNDERMINED IF EDUCATORS WERE NOT PROTECTED FROM RETALIATION FOR RAISING TITLE IX CONCERNS

There is a suggestion in the opinion below that even if Title IX might be construed in some circumstances to provide a right of action to recover for retaliation, it cannot be construed to confer that right upon educators, such as Petitioner Jackson, who are not—at least in the view of the Eleventh Circuit—the "direct" victims of the challenged Title IX violation. (Cert. Pet. 23a-26a.)

denied tenure due to concerns he had raised "about the behavior of faculty members pertaining to sexual harassment").

[20] *See Atkinson*, No. 01-CV-2141, 2002 U.S. Dist. LEXIS 1432, at ** 2-3 (former athletic director alleged that she was physically threatened by the Dean of Students and then fired after raising issues of gender equity in athletic program during the budget process).

[21] *Legoff v. Trustees of Boston Univ.*, 23 F. Supp. 2d 120, 124 (D. Mass. 1998).

[22] *Moe v. University of North Dakota*, No. Civ. A2-98-123, 1999 WL 33283358 (D.N.D. May 7, 1999) (wrestling team was eliminated after coach extended scholarship to female wrestler).

That suggestion is not well-considered in this particular case given the close identification between a coach and the team he or she coaches, *see supra* at 13, which renders it artificial to maintain that discrimination against the team only "indirectly" affects the coach. Modern conceptions of the harm that flows from discrimination are not so constricted. *See generally Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 111-15 (1979); *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 211-12 (1972).

More fundamentally, the suggestion that the statute should be interpreted to permit retaliation against an individual for acting to enforce the mandates of Title IX unless that individual is the "direct" victim of the Title IX violation in question should be rejected because it would allow schools and universities to accomplish by indirection what they cannot do directly. *Cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). There is perhaps no more potent way for a school or a university to squelch a complaint of unlawful sex discrimination in the distribution of athletic or educational opportunities, or to squelch a complaint of unlawful sexual harassment of a student, than to dismiss the coach, teacher, professor, or administrator who raised the matter with the school authorities or who cooperated in the investigation of a claim. Such retaliatory action not only effectively ends the ability of that particular educator to advocate for an end to the discrimination in question (as the individual is eliminated from the school environment) but sends students the entirely wrong message that the current practices—even though unlawful—cannot be questioned even by their role models without devastating consequences. Such acts do as much, if not more, to undermine the enforcement of Title IX, and to defy Congress' intent that the statute "provide individual citizens effective protection against" unlawful sex discrimination, *Cannon*, 441 U.S. at 704, as any "direct" violation of the statute.

CONCLUSION

The judgment of the court of appeals below should be reversed and this Court should uphold the long-settled interpretation of Title IX to protect from retaliation those individuals who raise or support Title IX complaints.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 2004

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND 31 OTHER ORGANIZATIONS AND INDIVIDUALS* IN SUPPORT OF PETITIONER

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American Medical Women's Association
Business and Professional Women/USA
California Women's Law Center
Coalition of Labor Union Women
Connecticut Women's Education and Legal Fund
Equal Rights Advocates
Girls Incorporated
Hadassah
League of Women Voters
Legal Momentum
National Asian Pacific American Women's Forum
National Association of Social Workers
National Association of Women Lawyers
National Association of Working Women (9to5)
National Council of Jewish Women
National Organization for Women Foundation
National Partnership for Women & Families
National PTA
Northwest Women's Law Center
Wider Opportunities for Women
Women's Business Development Center
Women Employed
Women's Law Center of Maryland, Inc.
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AMICUS CURIAE BRIEF OF NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, ET AL.

INTEREST OF *AMICI CURIAE*

Amici curiae are organizations and individuals dedicated to the achievement of equality of opportunity for

women and girls in education.[1] A number of the *amici* were instrumental in supporting the enactment of Title IX in 1972 and have been working to realize its goals for over thirty years. *Amici* have a vital interest in effectuating Title IX's original intent of broad and effective protection against gender discrimination in education, and thus in ensuring that the individuals who bring discriminatory practices to light are protected from retaliation and reprisal. Statements of the individual interests of the *amici curiae* are included in an Appendix to this brief.

SUMMARY OF ARGUMENT

Although much progress has been made in achieving Title IX's goal of promoting equal opportunity in education without regard to gender, thirty-two years after its enactment that objective is still far from realized. Women continue to be underrepresented in traditionally male educational programs that are most likely to lead to higher earning power upon graduation. Women are underrepresented in the faculties of colleges and universities, are more likely to be in the lower faculty ranks, are less likely to be tenured, and on average earn less than their male counterparts. Young women are offered fewer opportunities to play sports and receive less funding and fewer scholarships when they do. Girls and women remain all too likely to experience sexual harassment in schools. Because women in educational institutions are less likely to be in positions of power and authority than men, they are more susceptible to retaliatory action.

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[1] Letters from petitioner and respondents indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity, other than *amici*, make a monetary contribution to the preparation or submission of this brief.

Protection from retaliation is a necessary component of Title IX. Retaliation is not only a form of discrimination itself, it also intensifies and prolongs the harm to those who already have suffered discrimination, and deters and discourages those who witness and would report such practices. Moreover, retaliation promotes discrimination by impeding informal resolution of violations and by sending the message that inequities are tolerated, but speaking up is not. In the context of sexual harassment claims, in which the institution must have actual knowledge of the violation before monetary damages may be assessed, it would be particularly unfair to leave the victim of harassment open to retaliation for notifying the institution of the harassment.

In order to continue the progress towards Title IX's promise of equal educational opportunity, those individuals who experience or witness discrimination must remain free from retaliation so they can report what they see, express their concerns, and register their complaints. If the fear of retaliation makes individuals unable or unwilling to take these steps, gender inequities in education will not only persist, but may even worsen. To accept retaliation is to accept, even invite, inequality. Title IX, properly construed, must protect those individuals who bring violations of the statute to light.

ARGUMENT

I. DISCRIMINATION, INCLUDING RETALIATION AGAINST THOSE WHO REPORT IT, PERSISTS IN EDUCATIONAL INSTITUTIONS.

With the passage of Title IX of the Education Amendments Act of 1972 ("Title IX"), Congress broadly promised that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The statute has been accorded "a sweep as broad as its language," *North Haven Bd.*

of Educ. v. Bell, 456 U.S. 512, 521 (1982) (internal citation omitted), promoting equality of opportunity without regard to gender in every aspect of educational life, including admissions, recruitment, financial aid, academic programs, student treatment and services, vocational education, physical education and athletics, and employment. The "sweep" of the statute would be grievously curtailed if those who experience discrimination, usually women, have no protection from reprisal for reporting it.

A. While There Has Been Significant Progress In The Last Thirty Years, The Full Scope Of Title IX's Guarantees Are Far From Realized.

Today, thirty-two years after its enactment, Title IX has given millions of girls and women the chance to attend and graduate from college, play sports, and enter professions—experiences and opportunities that were largely denied to their mothers and grandmothers. In the 2001-02 academic year, for example, women earned 46 percent of all doctoral degrees, up from 14 percent in 1970-71.[2] That same year, women earned 46 percent of degrees in law, medicine, and dentistry, compared to 7 percent in 1970-71.[3]

Also noteworthy is the impact that Title IX has had on making student athletics more open to girls and women. In 1971, the year before Title IX became law, fewer than 300,000 girls participated in high school sports, making up less than seven percent of all high school varsity athletes. Now, the number approaches three million, with women making up nearly 42 percent of all high school varsity athletes. The number of women participating in intercollegiate sports in that same time span has gone from fewer than 30,000 to more than 150,000. Funding for women's teams has also substantially increased.[4]

And yet, these significant strides cannot mask that Title IX's full promise of equality of opportunity is still far from being realized. Among the more significant areas of concern:

Higher Education in Science and Engineering

- Men outnumber women in nearly every field in the sciences. In 1960, women made up less than three percent of all scientists. In 2003, they still constitute less than 20 percent of all scientists. With the exception of life sciences, women continue to earn fewer degrees than men in the sciences at all levels—bachelors, masters, and doctorates.[5]

- Women continue to be underrepresented in traditionally male fields that lead to greater earning power upon graduation. Undergraduate data from 2001-2002 show that women earned only 28 percent of the

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[2] U.S. Department of Education, National Center for Education Statistics, *The Condition of Education* 2004 (NCES 2004-077), Indicator 20 ("Degrees Earned By Women"), available at http://www.nces.ed.gov/programs/coe/2004/section3/indicator20.asp [hereinafter NCES, Indicator 20].

[3] NCES, Digest of Education Statistics, Table 259 (June 2003), available at http://www.nces.ed.gov/pubs2003/2003060.pdf.

[4] National Coalition for Women and Girls in Education, *Report Card on Gender Equity*, at 14-16 (June 2002), available at http://www.ncwge.org/title9at30-6-11.pdf [hereinafter Report Card on Gender Equity].

[5] General Accounting Office, Gender Issues: Women's Participation in the Sciences Has Increased, but Agencies Need to Do More to Ensure Compliance with Title IX, GAO-04-639, at 14-17 (July 22, 2004) [hereinafter GAO Report].

bachelor's degrees in computer and information sciences and only 21 percent of the engineering degrees. In computer and information sciences, there was actually a downward trend. The number of women receiving such bachelor's degrees decreased by more than eight percent from 1984-85 to 2001-02.[6]

- Sex segregation by academic concentration is even more acute in graduate degree programs. In 2001-02, fewer than one out of every three doctoral degrees in mathematics (29 percent), physical sciences (28 percent), computer and information sciences (23 percent), and engineering (17 percent) were awarded to women.[7]

Athletics

- In 2001, girls represented 41.5 percent of participants in high school varsity athletics.[8] Although there were 2.8 million girls playing high school sports in 2002, 4 million boys participated in high school sports teams.[9]

- With respect to college athletes, only 41 percent of participants in varsity athletics are women, and women received just 43 percent of

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6 NCES, Indicator 20 & tbl. 20-1.

7 NCES, Indicator 20, tbl. 20-2.

8 Report Card on Gender Equity at 15.

9 National Association of State Boards of Education, Policy Update: *Title IX After Thirty Years* (May 2003), available at http://www.nasbe.org/Membership/Educational_Issues/Policy_Update/11_8.pdf.

the athletic scholarships. Sixty-four percent of operating budgets are devoted to men's sports, with only 32 percent devoted to women's sports.[10]

- In the 2001-02 school year, female head coaches led 44 percent of women's intercollegiate athletic teams, the lowest total since the passage of Title IX, and down from 90 percent in the early 1970s. Since 2000, 90 percent of the available head coaching positions in women's athletics have gone to men. At the same time, the percentage of women coaching men's teams has remained consistent for 30 years, at two percent.[11]

Career Education

- Sex segregation persists in vocational education. Male students predominate in high-skill, high-wage career tracks that train them to be plumbers, electricians, welders, carpenters, and mechanics. Female students by comparison are clustered in the low-skilled, low-wage tracks training for jobs in cosmetology, child care, and health.[12]

- This sex segregation has a serious adverse impact on girls' and women's economic

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10 U.S. Department of Education, The Secretary of Education's Commission on Opportunity in Athletics, *Open to All: Title IX at Thirty*, at 19 (Feb. 28 2003), available at http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf (citing NCAA Gender Equity Survey (2001)).

11 Report Card on Gender Equity at 16-17.

12 *Id.* at 24.

prospects. In 2000, women made up 91 percent of teachers aides, 90 percent of nurses aides, and 91 percent of hairdressers, earning a mean annual salary of $18,770, $19,100, and $20,710 respectively. Women who were able to receive training for nontraditional jobs such as carpenters, plumbers, and electricians meanwhile earned a mean annual salary of $35,100, $40,170, and $42,210 respectively.[13]

Employment

- As of 1998-99, women made up less than 37 percent of faculty members in colleges and universities. The number of women is highest at two-year public colleges, in which women make up 49.9 percent of full-time instructional faculty members and staff, and lowest at private, four-year colleges and universities with significant research facilities, in which women are only 26.2 percent of the faculty.[14]

- Even in fields in which women earn most of the doctorates, they are under-represented on the faculty. Women earn 66.1 percent of the doctorates awarded in psychology, but hold only 45.4 percent of the assistant professor jobs. In the biological sciences, 44.7 percent of the PhD's between 1993 and 2002 were awarded to women; in 2002, women accounted

[13] *Id.* at 24-25.

[14] *Id.* at 28.

for only 30.2 percent of the assistant professors in the field.[15]

- In 1999-2000, 51 percent of female faculty members at all institutions had tenure, compared to 69 percent of the men. Those percentages have remained essentially unchanged for two decades.[16]

- In addition to making up a minority of the teaching faculty at colleges and universities, women generally have remained in the lower faculty ranks. In 1998, women were 53.5 percent of lecturers, 50.6 percent of instructors, 45 percent of assistant professors, 35.8 percent of associate professors, and only 20.8 percent of full professors. The average salary for women full professors for academic year 1998-99 was $64,236, just 88 percent of the $73,260 their male counterparts earned.[17]

- Women faculty in the sciences teach more often than their male counterparts and are given less opportunity to focus on their scientific research.[18]

[15] Donna J. Nelson & Diana C. Rogers, *A National Analysis of Diversity in Science and Engineering Faculties at Research Universities*, available at http://www.now.org/issues/diverse/diversity_report.pdf.

[16] NCES Digest, tbl. 242, available at http://www.nces.ed.gov/pubs2003/2003060.pdf.

[17] Report Card on Gender Equity at 28-29.

[18] GAO Report at 3.

Sexual Misconduct and Harassment

- Six in 10 of all students (both girls and boys) experience physical sexual harassment at some point in their school lives, one-third often or occasionally. Girls are more likely than boys to experience harassment.[19]

- Sexual misconduct, including abuse and harassment, is also all too common. Studies suggest that almost 10 percent of all students are subject to sexual misconduct by school employees between kindergarten and twelfth grade.[20]

In observance of Title IX's thirtieth anniversary in June 2002, the National Coalition for Women and Girls in Education (formed by over 50 organizations) issued a "Report Card on Gender Equity" reviewing the nation's progress in implementing the statute. Overall, the progress reports were decisively mediocre, with "substantial progress" being found in only two areas (Access to Higher Education and Math and Science), "some progress" being found in six areas (Athletics, Employment, Learning Environment, Sexual Harassment, Standardized Testing, and Treatment of Pregnant and Parenting Students), and "little progress" being found in two areas (Career Education and Technology). The report concludes that "despite the progress, barriers remain and more must be done to make Title IX the vehicle for equity it was intended to be."[21]

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19 Report Card on Gender Equity at 41.

20 U.S. Department of Education, Office of the Under Secretary, Policy and Program Studies Service, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, at 18-20 (2004).

21 Report Card on Gender Equity at 1.

B. Women Are at a Heightened Risk of Retaliation for Reporting Discrimination.

As the statistics above indicate, despite considerable improvements since 1972, women are still more likely to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in their education programs and activities. That inequitable standing is certainly troubling in itself. But an even more insidious concern is that having less authority, less prestige, and less status makes one more vulnerable to retaliation and reprisal for reporting or questioning that gender discrimination. Absent protection from retaliation, the voices that are most likely to be silenced are those most likely to experience and witness what the statute seeks to prevent.

While there do not appear to be statistical data specific to Title IX enforcement, one cannot avoid the unfortunate truth that those who voice complaints against discrimination are at a real and substantial risk of reprisal. In a report issued last month on "Women's Participation in the Sciences," the General Accounting Office concluded that federal agencies need to do more to ensure compliance with Title IX. Among other things, the report notes that students and faculty interviewed "suggested they would be unlikely to file a complaint for fear of retribution from supervisors or colleagues." Specifically, women faculty members reported that "although they perceive that discrimination exists in their department, filing a complaint could hinder their ability to attain tenure." *Id.*[22]

A survey of the relevant case law illustrates that the concerns expressed to the GAO investigators are not phantom fears, and that reprisal discrimination can and does occur when women speak out against potential violations of Title

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22 GAO, *Women's Participation in the Sciences*, at 11.

IX. *See, e.g., LeGoff v. Trustees of Boston Univ.*, 23 F. Supp. 2d 120 (D. Mass. 1998) (court found that coach stated a *prima facie* claim for retaliation based on allegations that she was told she would be terminated from her employment if she complained that she was paid less than her male counterparts for coaching two sports, while male coaches only had to coach one sport); *Nelson v. Univ. of Maine Sys.*, 944 F. Supp. 44 (D. Maine 1996) (awarding attorney fees to plaintiff after a jury found that the University retaliated against him in violation of Title IX for aiding students who were discriminated against on the basis of gender); *Litman v. George Mason Univ.*, 92 Fed. Appx. 41, No. 01-2128, 2004 WL 345758, at *1 (4th Cir. Feb. 25, 2004), *petition for cert. filed June 1, 2004*, No. 03-1628 (reversing district court's dismissal of retaliation claim in which student alleged that university wrongfully imposed academic sanctions against her and dismissed her from the university when she complained of sexual harassment by her professor). Even well-placed women in positions of authority find that they are not immune from retaliation when they complain of gender inequities in educational programs and activities. *See, e.g., Atkinson v. Lafayette Coll.*, No. 01-CV-2141, 2002 WL 123449 (E.D. Pa. Jan. 29, 2002), *appeal pending*, (Director of Athletics claimed her employment was terminated because she questioned gender inequity in the athletics budget; the court found that there was no cause of action for retaliation under Title IX).

It is evident that women complaining of sex discrimination are all too frequent targets of retaliatory actions, and studies of retaliation against women in other contexts illustrate the likely magnitude of the problem under Title IX. A recent report by *amicus* National Partnership for Women & Families reviewing charges filed with the Equal Employment Opportunity Commission (EEOC) concluded that "retaliation remains a serious and sizeable problem" and that "[w]omen in particular seem to be targets of alleged

retaliatory actions by employers."[23] The report called for closer scrutiny and analysis by the EEOC to determine whether women are perceived as "easy targets" or whether there may be "unique features of the work environments of many women workers that tolerate or even promote" retaliatory conduct. *See* National Partnership for Women & Families, *Women at Work: Looking Behind the Numbers, 40 Years After the Civil Rights Act of 1964*, at 11-12 (July 2004). A study of female "whistleblowers" who alleged sex discrimination on the job found that in spite of "explicit legal protection from retaliation for complainants in sex discrimination cases, over 40% of the respondents cited one or more instances of retaliation." Janet P. Near & Tamila C. Jensen, *The Whistleblowing Process: Retaliation and Perceived Effectiveness*, Work and Occupations, 3-28; 12-14 Feb. 1983, Vol. 10, No. 1.

Women reporting sexual harassment are particularly vulnerable to retaliatory actions. A study of state employees found that 62 percent of the respondent employees indicated that they suffered retaliation after reporting harassment. Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. Cal. L. Rev. 307, 375 (2004) (citing Louise F. Fitzgerald and Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. of Social Issues 117, 122 (1995)). Fear of retaliation is frequently cited as the primary explanation for the failure of

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[23] The data revealed that women filed almost 60 percent more retaliation charges than men. In fiscal year 2003, women filed 12,512 charges with the EEOC while men filed 7,813 charges. This proportion has remained fairly consistent over time. *See* National Partnership for Women & Families, *Women at Work: Looking Behind the Numbers, 40 Years After the Civil Rights Act of 1964*, at 12 (July 2004).

sexual harassment victims to report such behavior.[24] One study found that one third of the persons who filed formal harassment claims said that "it made things worse," while still another study found that reporting misconduct was associated with more negative outcomes of every type (job, psychological, health), even after controlling for the severity of the harassment.[25]

Because retaliation is so prevalent, Title IX cannot be enforced effectively without extending protection to those who report violations. And because there is evidence that retaliation may be often directed at women, barring a cause of action for retaliation may disproportionately harm women who face gender discrimination in education, thereby further undermining the goals of Title IX.

II. PROTECTION AGAINST RETALIATION IS ESSENTIAL TO EFFECTIVE ENFORCEMENT OF TITLE IX.

Although protection from retaliation is not explicitly provided for in the statute (any more than protection from any other specific type of discrimination is explicitly mentioned), the right to be free from discrimination must necessarily include protection from retaliation for those who seek to invoke Title IX's anti-discrimination guarantees. Retaliation exacerbates and perpetuates existing discrimination, frustrates the remedial goals of Title IX, and discourages informal resolution of statutory violations.

Failure to include retaliation within the scope of Title IX not only fails to remedy existing practices that violate the Title IX guarantee, but it also invites new, more insidious harms. If the individual retaliated against has already been subject to discrimination, any reprisal actions likely will increase the negative effects already suffered, be they economic, physical, or psychological. *See, e.g., Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations,* 82 Journal of Applied Psychology 401-15 (1997).

Moreover, unredressed retaliatory action sends the message that discrimination is institutionally tolerated and condoned. That message, in turn, may itself promote additional discriminatory or harassing acts and will discourage further action to combat it. *See* Faye J. Crosby, *Why Complain?*, 49(1) J. of Soc. Issues 169, 174 (1993) ("The organizational climate towards discrimination and retaliation is thus powerfully predictive of whether targets of discrimination choose to report it.").

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[24] *See, e.g.*, Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Relation Protection: Why Everyone, Including the Employer, Loses*, 5 Employee Rights & Employee Policy J. 549, 586-87 (2001) (noting that "only between 12 and 20 percent of harassed employees ever report the harassing conduct" and citing studies demonstrating that "nearly 70 percent of female employees questioned about their failure to report sexual harassment in the workplace considered the potential for retaliation to be a moderate or strong influence on their decision").

[25] *See, e.g.*, Deborah Erdos Knapp, et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework,* Academy of Management Review Vol. 22, No. 3 (July 1, 1997); Louise F. Fitzgerald and Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment,* 51 J. of Social Issues 117, 126-37 (1995); Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping With Sexual Harassment,* 42 J. of Vocational Behavior 28, 37-39 (1993). These and other studies are collected and reviewed in a forthcoming article by Deborah L. Brake, Associate Professor, University of Pittsburgh School of Law, tentatively entitled "Reporting Discrimination and the Dynamics of Retaliation" (work in progress).

As the Court has recognized in other contexts, freedom from retribution for reporting discrimination is part and parcel of the statutory guarantee. *Cf. Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) (construing the anti-discrimination provisions of 42 U.S.C. § 1982 to prohibit retaliation, holding that if plaintiff were "punished for trying to vindicate the rights of minorities protected by § 1982 . . . . Such a sanction would give impetus to the perpetuation of racial restrictions on property."); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that, even though state employee has no right to employment, the state could not simply fire him for criticizing his employer because "[t]his would allow the government to 'produce a result which [it] could not command directly.'") (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

Construing the Title IX private right of action as stopping short of protection against reprisal is not faithful to the statute and seriously undercuts the objective of protecting individuals from discrimination. If a victim of or witness to discrimination faces retaliation without recourse for reporting a violation of Title IX, the complainant likely will simply stay quiet. *See supra* notes 23 and 24 and accompanying text. That result directly sabotages the statutory purpose, because it creates conditions that support continued discrimination, allowing federal funds to continue to support the institution engaging in discriminatory conduct. *See Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (describing the twin goals of Title IX as "avoid[ing] the use of federal resources to support discriminatory practices . . . and provid[ing] individual citizens effective protection against those practices.").

The Court's emphasis on "notice" to school officials in its cases involving Title IX sexual harassment claims underscores the gross unfairness of reading the statute to exclude protection against retaliation. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), the Court held that Title IX provides no damages remedy in teacher-student harassment cases unless a school official who

has authority to institute corrective measures has "actual knowledge of discrimination in the recipient's programs and fails adequately to respond." In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the Court applied that same standard to student-on-student harassment, holding that a recipient of federal funds could be held liable for damages under Title IX where it has deliberately failed to respond to "known acts of peer sexual harassment." *Id.* at 649. In requiring that institutions have actual notice of harassment before they can be subject to a formal action for damages, the Court recognized that it was imposing a "high standard" on potential litigants. *Davis*, 526 U.S. at 643 (citing *Gebser*, 524 U.S. at 290-91). That standard would become virtually insurmountable if the institution were free to retaliate against individuals who act to put it on notice of harassment. It would be counterproductive, to say the least, to construe the statute to apply when the recipient either attempts to fix the problem or, once put on notice, does nothing (*i.e.*, remains deliberately indifferent) but to have no effect when the institution punishes the notice-giver for daring to report the harassing conduct.

Even where "actual notice" is not a formal requirement of bringing suit, notice to school and university officials remains the most efficient and effective means of achieving compliance with Title IX. And in the thirty years since Title IX was implemented, the majority of complaints have been investigated and resolved internally, without any need for agency proceedings or judicial enforcement. *See* Bernice Sandler, Address at the American Federation of Teachers National Convention (July 14, 2004) ("Many of the changes that occur as a result of Title IX . . . did not happen by lawsuits. They happen because of people like you who thought that these [changes] were worth fighting for and told the powers that be that something was unfair.").

In the Title VII context, courts have construed the anti-retaliation provision to be a "crucial part of Title VII's

administrative machinery both because it protects employees . . . and it encourages informal resolution of alleged instances of discrimination . . . ." *LaVigna v. WABC Television, Inc.*, 159 F.R.D. 432, 435 (S.D.N.Y. 1995); *accord Deravin v. Kerik*, 335 F.3d 195, 204 (2d Cir. 2003); *see also Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (rejecting a narrow application of Title VII anti-retaliation provision because it would "tend to force employees to file formal charges rather than seek conciliation or informal adjustment of grievances.").

Although there are significant differences between Title VII and Title IX, the anti-discrimination goals of both are served by prompt, informal resolution of violations. *See Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 254 (5th Cir. 1997) (internal citation omitted) ("[T]he implication of a private right of action for retaliation would serve the dual purposes of Title IX, by creating an incentive for individuals to expose violations of title IX and by protecting such whistleblowers from retaliation."). This informal resolution, however, depends on the willingness of individuals to report violations of Title IX. Protecting those who provide such notice therefore is essential to ensuring that schools and universities continue to have the opportunity to correct violations of Title IX without the need for formal action.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of petitioner, *amici* respectfully urge that the judgment of the Court of Appeals for the Eleventh Circuit be reversed.

Respectfully submitted,

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INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

Founded in 1971, the *National Partnership for Women & Families*, formerly known as the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, access to quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of anti-discrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and federal circuit courts of appeals to advance women's opportunities in education.

9to5, National Association of Working Women (9to5), founded in 1973, is a membership grassroots, non-profit organization that works to strengthen women's ability to achieve economic justice. 9to5 does this through campaigns focused on improving work/family policies, reducing poverty and increasing income supports, raising standards for the temp industry and eliminating all forms of discrimination. Since 1985, 9to5 has been conducting trainings in the public and private sectors to prevent sexual harassment and other forms of sex discrimination and increase awareness of what they are and are not. 9to5 has published and updated the 9to5 Guide to Combating Sexual Harassment. 9to5 is headquartered in Milwaukee, WI with other staffed chapters in Denver, CO and Atlanta, GA. There are an additional 15 volunteer chapters throughout the country.

Alabama NOW is the state affiliate of the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in more than 450 chapters in all 50 States and the District of

Columbia. Alabama NOW's goals include achieving equal education opportunities for women and girls. To that end, Alabama NOW advocates for vigorous enforcement of Title IX.

Founded in 1881, the *American Association of University Women* (AAUW) has fought for over a century for equity in education for women and girls. Crucial in the grassroots struggle to pass Title IX in 1972, AAUW and its membership of over 100,000 has lobbied at all levels of government to preserve the integrity and spirit of Title IX's standards and regulations. AAUW, and its Alabama Chapter, strongly believe that protection from retaliation is a central component for the fair and effective enforcement of any civil rights law.

The *American Association of University Women Legal Advocacy Fund* (LAF) is a nonprofit organization that assists individuals challenging sex discrimination in higher education. Since 1981, LAF has helped students, faculty, staff and administrators challenge various discriminatory practices at colleges and universities, such as sexual harassment, denial of tenure and promotion, pay inequity, retaliation, and inequities in athletics programs.

The *American Medical Women's Association* (AMWA) is an organization of 10,000 women physicians and medical students dedicated to serving as the unique voice for women's health and the advancement of women in medicine. AMWA was founded in 1915, at a time when women physicians were an under-represented minority. As women in medicine increase in numbers, new problems and issues arise that were not anticipated. AMWA has been and continues to be in the forefront of leadership in addressing these issues.

The *Business and Professional Women/USA* (BPW/USA), founded in 1919, promotes equity for all women in the workplace through advocacy, education and information. With 1,500 local organizations across the

country and members in every congressional district, BPW/USA is the leading advocate for millions of workingwomen on work-life balance and workplace equity issues. BPW/USA supports Title IX's prohibition of discrimination on the basis of sex in any education program or activity receiving federal financial assistance.

The *California Women's Law Center* (CWLC) is a private, non-profit advocacy and support center that works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic, and political constraints. CWLC's issue priority areas are sex discrimination, violence against women, women's health, race and gender, exploitation of women, and women's economic security. CWLC has expertise in the area of sex discrimination in education and, in particular, Title IX's prohibition against discrimination in school athletic programs. CWLC litigates, advocates and educates the community, advises the legislature, and joins as amicus in other cases related to this issue which is so crucial to the lives of women and girls.

The *Coalition of Labor Women* (CLUW) is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. For more than 20 years, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its 75 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as amicus curiae in numerous legal cases involving issues of gender discrimination and pay equity.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. For the past 30 years, CWEALF has provided legal information and conducted public policy and advocacy to ensure the spirit of Title IX is implemented and enforced in educational and employment opportunities.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). ERA has also appeared as *amicus curiae* in numerous cases before this Court, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Faragher v. City of Boca Raton*, 522 U.S. 1105 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Girls Incorporated, established in 1945, is a nonprofit youth organization that inspires all girls to be strong, smart, and bold. Through its affiliates across the country, Girls Inc. provides research-based afterschool and in-school programs, including sports programs, that empower girls to reach their full potential. Through its national advocacy, Girls Inc. works to protect Title IX and advance girls' rights in such areas as education and health. Girls Inc. serves girls ages 6-18 in over and is headquartered in New York City.

Hadassah, the Women's Zionist Organization of America, founded in 1912, is the largest women's and Jewish

membership organization in the United States, with over 300,000 members nationwide. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of women in the Unites States. Hadassah is strongly committed to supporting Title IX as a critical element in removing barriers to women's participation in society and promoting women's health.

The *League of Women Voters of the United States* is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. The League is organized in nearly a thousand communities and in every state, with more than 120,000 members and supporters nationwide. The League was founded in 1920 as an outgrowth of the 72-year struggle to win voting rights for women in the United States. Since its inception, the League has fought to ensure that women can take their full and rightful place in American society.

Legal Momentum (formerly NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights. Legal Momentum, then known as NOW Legal Defense, pioneered the implementation of Title IX with PEER, its nationwide Project on Equal Education Rights, from 1974-1992. It was co-counsel in *Doe v. Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX, and has appeared as *amicus curiae* in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

The *National Asian Pacific American Women's Forum* (NAPAWF) is a national, multi-issue advocacy organization founded in 1996 committed to forging a grassroots movement for social and economic justice and the political empowerment of Asian/Pacific Islander women and girls. With members across the country, NAPAWF seeks to educate and bring awareness to Title IX, the importance of equal educational and employment opportunities, and its implications for the Asian/Pacific Islander community.

The *National Association of Social Workers* ("NASW") is the largest organization of professional social workers in the world. The Alabama Chapter of NASW represents twelve hundred members. NASW's mission is to promote the quality and effectiveness of social work practice to further the broad purposes of improving society, and to provide high quality social work services in all communities. NASW publishes scholarly reference materials, four quarterly professional journals, and comprehensive research abstracts. NASW's members are highly trained and experienced social workers who provide professional services to individuals, families, and communities in a variety of settings including schools. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women.

The *National Association of Women Lawyers*, headquartered in Chicago, is the oldest women's bar association in North America. Founded in 1899, the Association promotes the interests of women and families, as well as women in the profession. The Association has filed as *amicus curiae* in the U.S. Supreme Court as well as the highest courts of many states. The Association has a strong interest in protecting the legal rights of women and girls to equal funding and equal access to athletic facilities, training,

and equipment, guaranteed by Title IX. The Association also has an interest in defending these rights by ensuring that individuals who work to protect and advance rights guaranteed by Title IX may, in appropriate cases, seek redress for reprisal discrimination.

The *National Council of Jewish Women* (NCJW) is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide. NCJW was actively involved in passage of the Title IX program, and NCJW's National Resolutions support "the enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all."

The *National Organization for Women* (NOW) Foundation is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States. Since its inception, NOW Foundation's goals have included achieving equal educational opportunities for women and girls

The *National PTA* is a non-profit organization of six million members dedicated to advocating for all children to receive a quality education. The organization has a long history of promoting gender and racial equality in schools, and has supported a number of legislative initiatives and court cases supporting this goal. The organization also promotes continued respect for, and expansion of, civil rights and requires they be defended whenever threatened.

The *Northwest Women's Law Center* (NWLC) is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information

and referral services. Since its founding in 1978, NWLC has been involved in both litigation and legislation aimed at ending all forms of discrimination against women. As part of that effort, NWLC has been dedicated to protecting and ensuring women's rights to equality in education and athletics. Toward that end, NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country.

Wider Opportunities for Women (WOW) is a non-profit organization established in 1964 that works nationally and in its home community of Washington, D.C. to achieve economic independence and equality of opportunity for women and girls. WOW's programs focus on technical and non-traditional skills, welfare to work transition, career development and family economic self-sufficiency. A woman's economic security very much depends on her ability to obtain an education free of gender bias.

The *Women's Business Development Center* is a nonprofit organization that provides programs and services to enhance women's economic empowerment through business ownership and advocacy. Effective Title IX enforcement and the equal participation of women and girls in educational activities are essential to women's economic empowerment.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts.

The *Women's Law Center of Maryland, Inc.* is a non-profit organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, workplace issues and family law. Established in 1971, the Women's Law Center achieves its mission

through impact legislation, research, direct legal services, legislative initiatives and public education.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education, and individual counseling. The WLP has worked throughout its history to eliminate sex discrimination in athletics and education under Title IX.

The *Women's Research & Education Institute* (WREI) was founded in 1977 to provide nonpartisan data and policy analysis to the women of Congress. Now an independent institution, WREI's agend is still based on arming the women and men of Congress (along with state and local legislators, advocates, the press and public) with the timely, reliable information they need to "make the case for women in America." Title IX has always been a priority issue at WREI.

Deborah Brake is an Associate Professor of Law at the University of Pittsburgh School of Law, where she teaches courses on Title IX and Sex Discrimination. She has written numerous law review articles on Title IX and is a frequent speaker and lecturer on issues related to Title IX.

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Hedy Ratner is a member of the Illinois Governor's Commission on the Status of Women, the Co-Chair of the Mayor Daley's Women's Health Task Force, the Author of the

Urban Women's Health Agenda, and Co-President of the Women's Business Development Center.

Bernice Resnick Sandler played a major role in the development and passage of Title IX and other laws prohibiting sex discrimination in education. She has worked with educational institutions concerning equity and sexual harassment issues for over 30 years and has written over 100 articles and four books in the field. She has also served as an expert witness in discrimination and sexual harassment cases.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

RODERICK JACKSON, *Petitioner*

v.

BIRMINGHAM BOARD OF EDUCATION, *Respondent*

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, ALABAMA ASSOCIATION OF SCHOOL BOARDS, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES AND ASSOCIATION OF SOUTHERN BAPTIST COLLEGES AND SCHOOLS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does Title IX of the 1972 Education Amendments encompass a third party private right of action for retaliation?

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INTEREST OF THE *AMICI*[1]

The National School Boards Association (NSBA) is a federation of 49 state school boards associations, the Hawai'i State Board of Education, and the school boards of the District of Columbia and the U.S. Virgin Islands. NSBA represents the 95,000 school board members who serve America's 15,000 public school districts.

The American Association of School Administrators (AASA) is a professional organization representing over 14,000 educational leaders across America and abroad. AASA's mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

The American Association of Presidents of Independent Colleges and Universities (AAPICU) is a nationwide association of more than 180 presidents of private colleges and universities. The institutions represented by AAPICU's members range in size from small colleges to very large research universities such as Baylor University and Brigham Young University.

The Association of Southern Baptist Colleges and Schools is a membership organization including 54 institutions in 19 states, almost all coeducational. Most of ASBCS's member institutions have prominent teacher-education programs for the training of elementary and secondary teachers.

The Alabama Association of School Boards (AASB) is recognized under state law as "the organization and representative agency of the members of the school boards of Alabama," and every local public school board in the state is an AASB member. AASB promotes and

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[1] *Amici* file this brief with the consent of both parties. Letters attesting to their consent are on file with this Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

supports the interests of its member boards of education on a variety of legal and educational issues.

Amici fully support the policy of non-discrimination underlying Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX). At the same time, *Amici* also have a critical interest in reducing wasteful litigation against public schools and other institutions of learning and in ensuring the effective management of school, college, and university personnel. Although not all of the issues raised by this case affect all private colleges and universities in the same manner as they do public school districts, *Amici* share concerns over both the broader potential impact of this case as well as its specific effect on the public school systems that prepare students for higher education.

SUMMARY OF THE CASE

Respondent Birmingham Board of Education employed Petitioner Jackson as a teacher and girls' basketball coach. During his service as coach, he became convinced that his players were being denied equal access to funding, facilities, and equipment and complained to various school officials. He alleges that, as a result of his complaints, he received negative performance evaluations and eventually was relieved of his coaching duties,[2] although he continued as a teacher in the district.

The district court dismissed Petitioner's complaint for failure to state a claim, holding that Title IX does not prohibit retaliation. The Eleventh Circuit Court of Appeals affirmed the dismissal, finding that Title IX does not prohibit retaliation, and that Petitioner is not within the class that would be protected by such a cause of action since the statute protects only direct victims of gender discrimination.[3]

[2] Because this case was decided on a motion to dismiss, the Eleventh Circuit assumed that the board removed Petitioner from his coaching duties in retaliation for his complaints. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1335 (11th Cir. 2002).

SUMMARY OF THE ARGUMENT

The key question in this case is whether Congress intended to give third parties who experience no gender discrimination the right to seek judicial remedies under Title IX. Since there is no express private right of action under Title IX, Petitioner can prevail only by establishing an implied private action for retaliation that extends to third parties. This Court in *Alexander v. Sandoval*[4] held that congressional intent is the key to finding an implied private right of action. There is no reason to believe Congress intended to extend a cause of action beyond persons discriminated against on the basis of sex. Instead, Congress provided for comprehensive administrative enforcement and judicial access for direct victims of gender discrimination. An implied right of action under Title IX for retaliation is not necessary to achieve the statute's purposes since those who advocate the rights of others are adequately protected from retaliation by numerous discrete rights.

The Court's decision on this Title IX issue will have implications for other statutes affecting school boards and educational institutions, potentially subjecting schools to litigation never contemplated by Congress. Litigation against school boards represents a diversion of scarce resources and a distraction from their mission of academic achievement that the nation's schools can ill afford. This Court should be mindful of this when contemplating whether to add a cause of action to other existing avenues of redress for plaintiffs such as Petitioner, although no such cause of action has been set

[3] *Id.*

[4] 532 U.S. 275 (2001).

forth explicitly in the statute. These effects would inflict significant costs on communities and their schools.

ARGUMENT

Amici fully support the purpose and goals of Title IX and acknowledge Title IX's critical role in bringing gender equity to schools. *Amici* also agree that if left unchecked, retaliation against individuals for asserting Title IX rights would diminish the effectiveness of the statute in achieving gender equity. That said, however, *Amici* do not concede that Congress intended Title IX to grant individuals who complain of sex discrimination directed at others the right to sue for alleged retaliation. Nor do *Amici* believe such judicial access necessary to the enforcement of Title IX. In fact, it would encourage needless litigation for school districts and other educational institutions, with little compensating benefit to victims of gender discrimination.

I. Creating a private right of action for third party advocates is not necessary to further the goals of the statute.

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance."[5] To ensure that the objective of this provision is fulfilled, the statute grants extensive monitoring and enforcement authority to an administrative agency and provides an implied right of action for "victims of illegal discrimination."[6] These remedies make a right of action for third party advocates to assert retaliation claims unnecessary to achieving the statutory goals.

A. Congress provided for broad agency enforcement of Title IX, ensuring gender discrimination victims effective administrative remedies.

Congress modeled Title IX on Title VI of the 1964 Civil Rights Act,[7] delegating broad authority to an administrative agency to create a regulatory structure that relies heavily on complaints filed by individuals or agency-initiated compliance reviews to administratively enforce the nondiscrimination obligations imposed on schools. While these regulations do not exclude third party advocates from involvement in agency investigations and proceedings, they clearly are meant to provide direct victims of discrimination a means to complain and obtain an administrative remedy.

The regulations require educational institutions receiving federal funds to submit to the agency regular compliance reports, to grant the agency access to district books, records, accounts, and other sources of information to ascertain compliance, and to make such information available to students and staff in such a manner to apprise them of the protections against discrimination assured them by the law.

In addition, the regulations require periodic compliance reviews by the agency, allow individuals to file complaints with the agency about discrimination prohibited by the law, and require the agency to conduct investigations whenever it receives information that indicates possible failure by a recipient to comply with the statute. The regulations encourage informal means to resolve complaints and prohibit retaliation against individuals who complain or participate in agency

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[5] 20 U.S.C. § 1681(a) (2004).

[6] *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979).

[7] 42 U.S.C. § 2000d (2004).

investigations. In the event voluntary compliance cannot be secured, the agency is authorized to suspend, terminate, or refuse to grant or continue federal financial assistance, or may refer the case to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce the Act.[8]

The Office for Civil Rights (OCR) of the U.S. Department of Education is responsible for enforcing Title IX. When OCR receives a timely complaint, it determines its jurisdiction over the school district and the issue and attempts to resolve the matter. OCR may do this through:

1) The *Early Complaint Resolution*, a mediation process in which OCR attempts to facilitate an agreement between the complainant and the school district;

2) Negotiated agreements known as *Agreements to Resolve* in which the school district undertakes certain commitments such as reviewing and revising policies and procedures, reporting to OCR on actions taken, and allowing monitoring by OCR to ensure compliance; or

3) Investigation and enforcement which may result in a negotiated corrective action plan; a formal letter of finding that includes a statement of OCR's jurisdictional authority, a statement of issues, findings on each issue, and a conclusion for each issue; initiation of administrative proceedings to suspend federal funds; or referral to the Department of Justice.

Complaints can arise from the general public, direct victims of sex discrimination, or even third party advocates. OCR can even initiate review, without ever receiving a complaint.[9]

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[8] 34 C.F.R. 106.71 (2004) (incorporating Title VI procedural provisions found at 34 C.F.R. 100.6 - 100.11 (2004) and 34 C.F.R. part 101) (2004).

[9] U.S. Department of Education, Office for Civil Rights, CASE RESOLUTION MANUAL (2004).

Other regulatory mechanisms ensure that students, staff, and parents understand Title IX protections and are aware of the procedures available for review and enforcement. Under the regulations, schools are required to:

1) Designate a responsible employee as a Title IX coordinator;

2) Provide annual notice of the identity of the coordinator and how to contact this coordinator for assistance;

3) Adopt and publish grievance procedures to implement Title IX and its regulations; and

4) Provide annual and specific public notice of the school district's policy on non-discrimination.[10]

This comprehensive regulatory scheme provides effective redress and remedies to gender discrimination victims. Implying a right of action for third parties to assert a retaliation claim in court on their own behalf is not necessary to promote the purposes of Title IX.

B. Congress provided an implied right of action for victims of gender discrimination.

This Court has ruled that Congress intended to provide a private right of action for the limited class of individuals for whose benefit Title IX was enacted, i.e., victims of discrimination or exclusion on the basis of gender.[11] In so ruling, the Court viewed a private

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[10] 34 C.F.R. 106.8, 106.9 (2004).

[11] *Cannon*, 441 U.S. 677. In *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), this Court held that Title IX authorizes damages as a remedy for intentional violation of Title IX. *Accord Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

litigant's direct access to judicial relief as "fully consistent with—and in some cases necessary to—the orderly enforcement of the statute."[12] But the Court made clear that this right of action belongs only to "victims of illegal discrimination."[13] This additional remedy creates strong incentives for schools to eliminate intentionally discriminatory practices that would violate the statute. Granting a separate private right of action for third party advocates who seek a remedy for alleged retaliation in their own right is not necessary to protect the rights of gender discrimination victims under Title IX.

C. A third party advocate is not "the only effective adversary" of Title IX discrimination.

Despite the fact that under Title IX gender discrimination victims enjoy adequate access to school officials, administrative remedies, and the courts to assert their claims, Petitioner seeks to anoint teachers and coaches as "the only effective adversar[ies]" or advocates for students subjected to sex discrimination, thus entitling them to judicial remedies for any alleged retaliation based on such advocacy. Supposedly, these staff members qualify for this role because of their access to inside information necessary to determine discrimination is occurring, their interest in promoting equal treatment at their schools, and their relative courage and maturity to bring charges of discrimination. Not only does this argument ignore the underlying legal

[12] *Cannon*, 441 U.S. at 705-06.

[13] Direct victims who bring lawsuits to challenge illegal discrimination could no doubt introduce evidence of any retaliation they might have experienced for protesting the discrimination in earlier stages of the dispute as proof that the discrimination was intentional.

rationale for granting non-victim advocates access to judicial remedies,[14] it does not reflect reality.

Petitioner portrays students as "generally poorly situated to recognize discrimination or to raise complaints."[15] In fact, as any parent knows, children are more than able to voice their perceptions of unfair treatment from an early age. Children do not need to know detailed information about the differences in budget allocations between similarly situated teams to recognize that their school has stuck them with lousy uniforms, inadequate practice facilities, and a third rate coach or has in some other manner treated them unfairly. Petitioner assumes that students in such circumstances would keep this information to themselves rather than express their concerns and that parents are so uninvolved in or clueless about their children's extracurricular pursuits that they would fail to recognize on their own that their children are being shortchanged.

[14] In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court granted *standing* under section 1982 to a white homeowner who had been expelled from a private community corporation after he protested the corporation's refusal to allow him to transfer his membership shares to a black family to whom he had rented a home in the community. The Court did so in part because Sullivan was the "only effective adversary" of the discrimination against the black lessees. If Sullivan lacked standing, then there would have been no litigant able to seek a court order to stop the discriminatory acts by the community corporation; the black family who was denied the membership shares had moved from the community and so was limited to seeking damages. Under Title IX, discrimination victims can seek administrative and judicial remedies on their own and so do not require a third party to assert their rights *in court* to stop illegal discrimination. It is significant that Sullivan was continuing to advocate for the discrimination victims in court and was not simply seeking a remedy for the retaliation alone. Granting the private right of action sought by Petitioner in this case would allow third party advocates to bring Title IX actions that may provide them individual relief from retaliation but do nothing to force an offending educational institution to cease the discriminatory practices that triggered the protests in the first place.

[15] Brief of Petitioner at 40.

To those who govern and manage the nation's schools, this notion is mystifying. Many parents are actively involved in every aspect of their children's education through direct communication with their children, teachers, and other parents, attendance at school activities, and participation in school organizations such as parent-teacher associations and booster clubs that support student athletic and arts programs—all of which is encouraged and supported by the school system itself. Parents are anything but hesitant to bring their concerns, large and small, about their children's education or the operation of school programs to the attention of teachers, school administrators, school boards, local government officials, administrative agencies, the news media, and, if they feel necessary, the courts. Parents are in a real sense and under the law the primary advocates for their children's rights, including those afforded by Title IX. They are more than able to invoke the readily available administrative and judicial remedies on behalf of their children.

D. Many other discrete remedies for retaliation effectively protect those who protest discrimination against others.

Amici agree that educational institutions should not be able to retaliate against individuals for complaining about perceived gender discrimination against others. But we do not agree that these individuals need a private right of action for retaliation under Title IX in order to encourage their advocacy for others. Many protections from retaliation were already available to staff and students at the time Title IX was enacted, protections about which Congress knew and assumed would be available to anyone retaliated against

for speaking about violations of the statute it was enacting.[16]

Since Title IX's enactment the legal protections against retaliation have increased, making it patently clear that this Court need not find an implied private right of action for retaliation under Title IX based on the specious argument that effective enforcement of Title IX and achievement of its purposes will be seriously undermined without it. The fact of the matter is that teachers, coaches, and students have a well-stocked legal arsenal against unjust retaliation for speaking up about discrimination.

First Amendment protections. One of the most effective remedies available at the time of Title IX's enactment was the First Amendment right of staff and students at public schools to express their views on matters of public importance. In 1968, the Court had decided in *Pickering v. Board of Education of Township High School District*[17] that a teacher may not be dismissed from employment based on exercise of his or her right to speak on issues of public importance.[18] One year later, this Court declared that schools cannot restrict students from engaging in private speech on public policy issues absent material and substantial disruption of

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[16] The fact that Congress heard witnesses testify at hearings that women at their schools who protested sex discrimination experienced retaliation does not support an implicit private right of action for retaliation. To the contrary, if after hearing such testimony, Congress felt the retaliation remedies that already existed at the time of enactment to be insufficient to support Title IX's purposes, it would have had every reason to make a private right of action explicit and to make clear that this right applies to anyone subjected to retaliation for alleging or complaining of discriminatory practices that violate the statute. Congress did not do so.

[17] 391 U.S. 563 (1968).

[18] In fact, some of the issues about which Mr. Pickering spoke out concerned the differences in the school board's expenditures on athletic facilities and programs in two separate high schools, a situation analogous to the one at hand.

school operation or infringement of the rights of others. *Tinker v. Des Moines Independent Community School District*.[19]

Since this Court's rulings in *Pickering* and *Tinker*, courts across the country have issued numerous decisions [including subsequent opinions from this Court] to clarify the extent of these rights balanced against the interests of schools as educators in maintaining environments conducive to learning and as employers in operating schools in an efficient manner to accomplish their educational mission.[20] School staff and students understand that the First Amendment protects their right to speak up about issues of public concern, which would include discrimination occurring at their schools or unfairness in their schools' athletics programs. Judicial dockets testify to the fact that members of the school community do exercise these rights and do not hesitate to sue schools when they believe their district has punished them for speaking out.[21]

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[19] 393 U.S. 503 (1969).

[20] *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding school authority to regulate school sponsored student speech based on legitimate educational concerns); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding school authority to regulate student speech containing sexual innuendo); *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977)(allowing school district to show that it would have reached same decision to discipline a teacher even in absence of protected speech).

[21] *See, e.g., Seamons v. Snow*, 84 F.3d 1226, 1237-38 (10th Cir. 1996) (recognizing that student athlete who was suspended from team for reporting locker room hazing and refusing coach's order to apologize to the team for the reporting stated First Amendment claim); *Boyd v. Board of Directors of McGehee Sch. Dist. No. 17*, 612 F. Supp. 86 (E.D. Ark. 1985) (awarding damages to black student athletes for coach's violation of their First Amendment rights by suspending them after they protested "election" of white homecoming queen); *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640 (8th Cir. 1983)(finding that district's involuntary transfer of football coaches who spoke out against corporal punishment of athletes violated coaches' First Amendment rights); *Lowery v. Texas A&M University System*, 11 F. Supp. 2d 895 (S.D. Tex. 1998) (finding female basketball coach's

Civil rights statutes. Another effective measure against retaliation that existed at the time Congress enacted Title IX was the anti-retaliation provision set forth in Title VII of the 1964 Civil Rights Act.[22] Like the First Amendment, Title VII's deterrent force is undiminished after 40 years, as courts continue to recognize retaliation claims brought by school employees under that statute.[23] While Title VII relates only to employment discrimination and not to other forms of discrimination that Title IX reaches, it does provide strong protection against employers imposing adverse employment consequences on school staff members who might speak out against gender-based discrimination in working conditions and employment practices.

In addition, most states have enacted civil rights laws that forbid sex discrimination in employment[24] and some have broadened this prohibition specifically to education programs and opportunities,[25] thus providing an additional layer of protection for staff and students.

Public policy exception. More than a decade before Title IX was enacted, courts had recognized a public policy exception to the employment at will doctrine. This exception allows employees terminated for reasons contrary to a clear mandate of public policy to bring wrongful termination cases against their

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comments on gender equity problems at university qualified as speech on matters of public concern for which university officials could not retaliate against her), on remand from, 117 F.3d 242 (5th Cir. 1997) (pre-*Sandoval* decision finding coach had private right of action under Title IX for retaliation based on regulatory language).

[22] 42 U.S.C. § 2000e-3(a)(2004).

[23] *See, e.g., Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001); *Tesser v. Board of Educ. of City Dist. of City of New York*, 370 F.3d 314 (2d Cir. 2004); *Cherry v. Ritenour Sch. Dist.*, 361 F.3d 474 (8th Cir. 2004).

[24] *See, e.g.*, ALASKA STAT. § 18.80.220 (Michie 2003); ARK. CODE ANN. § 41-1463 (Michie 2004); CAL. GOV'T CODE § 12940 (2004).

[25] *See, e.g.*, ALASKA STAT. § 14.18.010 (Michie 2003); ALA. CODE § 6-82-1102 (2003).

employers.[26] Since then, courts have greatly expanded the public policy exceptions that limit retaliatory actions by employers.[27] Courts have made clear that the public policy underlying wrongful discharge claims may derive from many sources including legislation, administrative rules, regulations or decisions, and judicial decisions.

Whistleblower statutes. Employees are also shielded by whistleblower statutes from retaliation when they engage in activities promoting public policy. Although such statutes were not in place when Title IX was passed, all states now have provisions that protect employees from adverse employment actions and provide various remedies such as reinstatement, back pay, and special damages such as attorneys' fees, expert witness fees, and litigation costs. The statutes do vary as to the type of employees covered (public or private) and what constitutes protected activities, but all provide protection to public employees who report unlawful activity.[28]

In addition to these explicit protections against retaliation, other legal rights allow school staff and students to challenge disciplinary actions taken against them for improper reasons. While not specific to retaliation claims, these constitutional, contractual, and statutory rights prevent schools from imposing disciplinary consequences without first meeting

[26] *See, e.g., Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)(protecting from discharge employee who refused to follow employer's instruction to commit perjury).

[27] *See, e.g., Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975)(finding wrongful discharge based on employee's taking time off for jury duty); *Harless v. First National Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978)(finding wrongful discharge based on employee's urging bank's compliance with consumer protection laws); *McNulty v. Borden*, 474 F. Supp. 1111 (E.D. Pa. 1979)(finding violation of public policy in discharging employee who refused to cooperate with pricing scheme prohibited by antitrust laws).

[28] *See* Victoria L. Donati, *Whistleblowers and Other Retaliation Claims*, 697 PLI/LIT. 987, 999 (Practicing Law Institute 2003).

substantive and procedural criteria meant to ensure fairness and protection of individual rights.

Due process protections. Both staff and students have due process protections under the Fourteenth Amendment against retaliatory discipline that offer them a spectrum of procedures ranging from notice of charges, to opportunity to be heard, to evidentiary hearings and appeal mechanisms meant to ensure that discipline is meted out fairly.[29]

Statutory tenure rights. In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years.[30] This property right to continuous employment, which is protected by the Fourteenth Amendment of the Constitution, guarantees teachers significant substantive and procedural due process rights in the event of attempted dismissal.[31] In terms of substantive rights,

[29] *See Goss v. Lopez*, 419 U.S. 565 (1975)(ruling that student may not be excluded from school without notice and an opportunity to be heard); *Perry v. Sindermann*, 408 U.S. 593 (1972)(deciding public employee with property interest in continued employment created by agency rules or employer's words or conduct entitled to due process); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)(finding that where government confers a property right in continued employment through tenure statute, due process must be provided before termination of the right).

[30] *See* Education Commission of the States, *Teacher Tenure/Continuing Contract Laws: Update for 1998* (1998), *available at* http://www.ecs.org/clearinghouse/14/41/1441.htm; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990).

[31] *See Cleveland Bd. of Educ.*, 470 U.S. 532. School staff who are not covered by tenure laws may still have some due process protections by virtue of their interest in employment based on civil service laws applicable to public employees generally. Even where teachers have no property interest in their employment, they have a liberty interest pursuant to the Fourteenth Amendment if the school district's action stigmatizes them or disables them from taking advantage of other employment opportunities. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). Where a liberty interest is at stake in a

local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions.[32] While these criteria vary by state, typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty.[33] Even in egregious cases, proving that a teacher's conduct met these statutory criteria can be difficult.[34] The procedural rights guaranteed by state statutes and case law likewise vary among jurisdictions. Generally, however, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented.[35] Moreover, all states allow teachers to appeal the school board's decisions to some entity—a state court, a tenure commission, the state board of education, etc.[36] Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times.[37]

Contractual rights. Additional rights often provided in collective bargaining agreements also make terminating teachers difficult. Approximately two of three states have enacted collective bargaining statutes covering teachers and mandating that local school boards bargain with unions over the terms and conditions of employment.[38] Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in state statutes.[39] Typically, these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures. Perhaps more important than the rights guaranteed to teachers through the collective bargaining process is the benefits of union representation where termination is sought. Unions often provide legal representation at no charge to teachers who have been terminated.

Given that ample legal remedies against retaliation are already provided under other laws, a third party advocate's cause of action under Title IX is not

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teacher termination, the teacher has a due process right to notice and a hearing to clear his or her name. *See id.* at 573 n.12.

[32] *See* Education Commission of the States, *supra* note 30; BRIDGES, *supra* note 30.

[33] *See id.*

[34] Under some state statutes, teachers may only be terminated for very egregious conduct. *See, e.g.,* OHIO REV. CODE ANN. § 3319.16 (West 2004) (providing that tenured teacher can be dismissed only for "gross inefficiencies or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause." The burden of proof in teacher termination cases often is on the school district. *See* BRIDGES, *supra* note 30; David M. Pederson, *Statutory Dismissal of School Employees*, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES AND TECHNIQUES 10-4 to 10-5 (National School Boards Association 1997).

[35] *See* BRIDGES, *supra* note 30; Pederson, *supra* note 34, at 10-1-10-2.

[36] *See* Education Commission of the States, *supra* note 30.

[37] *See id.*

[38] *See* Education Commission of the States, *State Collective Bargaining Policies for Teachers* (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm.

[39] Even where employees are not covered by collective bargaining statutes, courts have held that employee handbooks can create a contractual agreement between employer and employees. *See, e.g., Toussaint v. Blue Cross and Blue Shield of Michigan*, 292 N.W.2d 880 (1980) (finding employee could not be discharged except for cause as stated in personnel policy manual); *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 443 N.E.2d 441 (1983) (holding employer's right to discharge was limited by statement in employee handbook that dismissal could only be based on just and sufficient cause). Likewise, courts in some states have recognized an implied covenant of good faith and fair dealing in at will employment. *See, e.g., Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220 (Alaska 1992) (requiring based on an implied covenant that employers exercise their discretion reasonably, fairly and in good faith by treating employees alike, by not discharging employees for unconstitutional reasons and by not violating public policy in dealing with employees).

necessary to ensure that students and employees can speak out and identify perceived sex discrimination. If individuals are deterred from asserting their own rights or the rights of others, it is for reasons other than lack of legal protection.[40] Yet another path to the courthouse simply is not necessary for effective enforcement of Title IX.

II. Courts should not, as a matter of course, read into all anti-discrimination statutes an implied cause of action for retaliation, especially as to plaintiffs who do not allege that they were victims of discrimination.

A. A rule of statutory construction requiring that wide reaching causes of action be inferred in all anti-discrimination statutes is incorrect as a matter of law.

Invoking this Court's ruling in *Sullivan v. Little Hunting Park,*[41] Petitioner posits a "general rule that broad statutory bans on discrimination are construed to include prohibitions on retaliation."[42] Petitioner further cites several civil rights statutes for the proposition that anti-discrimination statutes "consistently protect all those who complain even if they complain solely about discrimination against others."[43]

These statutory provisions neither reflect such a general rule nor undermine the rationale for

[40] *Amici* acknowledge that not all of these remedies are necessarily available to every individual who might experience retaliation for protesting the violation of someone else's Title IX rights. But in most cases, a potential plaintiff would have at least one, if not more, legal protections against retaliation. For example, Petitioner could have asserted a free speech claim.

[41] 396 U.S. 229 (1969).

[42] Brief of Petitioner at 8.

[43] Brief of Petitioner at 38.

distinguishing claims by non-victims where Congress has not expressly extended a statute's reach so widely. To the contrary, they vindicate this Court's reasoning in *Sandoval* and illustrate *Sandoval's* applicability to the question presented by this case.[44]

That Congress has taken such care to specify causes of action for retaliation, and to define their reach, in so many statutes is reason to view with caution the assertion that Congress intended similar causes and reach where it has not so specified. Examples of express statutory retaliation provisions are found in the Title VII of the Civil Rights Act of 1964,[45] the Americans with Disabilities Act (ADA),[46] the Age Discrimination in Employment Act (ADEA),[47] the Rehabilitation Act,[48] the

[44] 532 U.S. at 288 ("In determining whether statutes create private rights of action, as in interpreting statutes generally,...legal context matters only to the extent it clarifies text.").

[45] 42 U.S.C. § 2000e-3(a) (prohibiting discrimination against employee because employee has opposed any unlawful employment practice under Title VII or has participated in related proceeding). Petitioner is mistaken in suggesting, in support of its proffered rule of broad statutory construction, that courts merely have construed this language to ban retaliation despite the absence of the word "retaliation." *See* Brief of Petitioner at 15, 18. The term "discrimination" as used here refers not generally to the race-based discrimination that Title VII prohibits but expressly and specifically to actions taken against an employee for opposing unlawful employment practices. This section of Title VII applies to any practice made unlawful "by this subchapter," including Title VII's more recently enacted provision concerning federal employment. 42 U.S.C. § 2000e-16 (2004). This obviated the need for Congress to repeat such express language in the new section. *See* Brief of Petitioner at 35. Title IX lacks comparable language.

[46] 42 U.S.C. § 12203(a) (2004) (prohibiting discrimination against any individual because individual has opposed act or practice made unlawful under ADA or participated in related proceeding).

[47] 29 U.S.C. § 623(d) (2004) (prohibiting employment discrimination against employee because employee has opposed any unlawful employment practice under the ADEA or has participated in related proceeding). As with Title VII, and in contrast to Title IX, this provision expressly provides a cause of action for retaliation. *See supra* note 45.

Fair Labor Standards Act (FLSA),[49] the Family and Medical Leave Act (FMLA),[50] and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[51]

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[52] Where it wishes to extend express statutory causes of action beyond the range initially set forth, Congress can revise the statute accordingly, and has done so.[53] Congress' record of providing express causes of action for retaliation in new and existing statutes in the years since the *Sullivan* decision is wholly incompatible with the suggestion that, since then, Congress has understood its proscriptions against discrimination implicitly to accomplish this end, particularly as to plaintiffs who are not victims of discrimination.

Several of the instances in which courts have recognized implicit causes of action for retaliation under federal statutes do not bear on the Title IX analysis. Unique considerations distinguish *Sullivan's* treatment of the § 1982 retaliation claim in that case from the case now before the Court.[54] Cases finding that white plaintiffs can sue under § 1981 for retaliation on the basis of race in the making and enforcement of private contracts have held that white plaintiffs are, in fact, members of the protected class under the statute.[55] That lower courts sometimes have reached back to the "*ancien regime*" of the *Sullivan*-era cases in other statutory contexts, such as Title IX, Title VI, and the Rehabilitation Act,[56] merely highlights the need for greater clarity concerning *Sandoval's* requirements and applicability.[57]

This chronological context also is significant as to the assertion, made in support of the asserted broad rule of statutory construction, that courts have not precluded claims by plaintiffs who do not allege that they suffered discrimination themselves and that no Title IX case has turned on whether the plaintiff was a direct victim.[58]

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[48] 29 U.S.C. § 794(d) (2004) (incorporating by reference standards under ADA to determine violations of Rehabilitation Act as to complaints alleging employment discrimination); 29 U.S.C. § 791 (2004) (establishing affirmative duties of federal employers to meet needs of disabled employees and incorporating by reference ADA's standards as to employment claims for determining violation under this section). The ADA, in turn, expressly prohibits retaliation against an individual for opposing a practice made unlawful under its provisions. *See supra* note 46.

[49] 29 U.S.C. § 215(a)(3) (2004) (prohibiting employer from discriminating against any employee because employee has filed FLSA complaint or is involved in some way with related proceeding).

[50] 29 U.S.C. § 2615 (2004) (prohibiting employer from discharging or in any other manner discriminating against any individual for opposing any practice made unlawful under FMLA or participating in related proceeding). Congress's use of the term "discrimination" in this context is consistent with its use in the express anti-retaliation provisions of Title VII and the ADEA, as FMLA is not an anti-discrimination statute. *See supra* notes 45, 47.

[51] 38 U.S.C. § 4311(b) (2004) (prohibiting discrimination in employment or adverse employment action against any person for taking action to enforce protection afforded any person under USERRA or participating in related proceeding and providing expressly that such prohibition "shall apply with respect to a person regardless of whether that person has performed service in the uniformed services"). This provision affords a compelling example of Congress expressly extending a retaliation cause of action to those who champion the rights of others.

[52] *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (quoted in *Russello v. United States*, 464 U.S. 16, 23 (1983)).

[53] For example, the Rehabilitation Act was amended in 1992 to incorporate by reference the ADA's standards as to employment actions.

[54] *See supra* note 14.

[55] *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976).

[56] *See infra* p.22-23 and notes 60-65.

[57] 532 U.S. at 287 (declining invitation to "revert in this case to the understanding of private causes of action that held sway 40 years ago....").

[58] Brief of Petitioner at 38.

This argument in the negative is akin to the argument that Congress, by not expressly *precluding* retaliation claims in certain contexts, implicitly authorizes them.[59] The Eleventh Circuit noted that, as far it was aware, it was the first court of appeals to consider the question after this Court's decision in *Sandoval* and only one court of appeals had considered the matter before *Sandoval*.[60]

B. A ruling in this case suggesting a rule of statutory construction requiring that wide reaching causes of action be inferred in anti-discrimination statutes would have far reaching repercussions.

A decision by this Court to read a cause of action for retaliation into Title IX, including for plaintiffs who do not allege that they were victims of discrimination, would have implications for litigation under other anti-discrimination statutes which provide no express cause of action, under which no implicit cause has yet been recognized by the courts, or as to which courts have split on the issue. Indeed, Petitioner cites this concern in reverse; it expresses concern that affirming the Eleventh Circuit may have negative implications for other anti-discrimination protections, although several of the statutes that it cites as examples need not be so implicated since, unlike Title IX, they include express proscriptions on retaliation enacted by Congress.[61]

If this Court reverses the Eleventh Circuit in this case, one result could well be increased retaliation claims under Title VI. A split panel of the Fourth Circuit held in *Peters v. Jenney* that this Court's ruling in *Sandoval* does

[59] *See* Brief of United States at 11 ("The text of Title IX does not require that the victim of discriminatory retaliation must also be the victim of the discrimination that is the subject matter of the original complaint.").
[60] *See Jackson*, at n.15.
[61] Brief of Petitioner at 18.

not preclude an implicit cause of action for retaliation by a plaintiff who was not herself a victim of discrimination.[62]

Similarly, reversal could also have implications for litigation under the ADEA. In 1996 a split panel of the Fifth Circuit ruled in *Holt v. JTM Industries* that an employee who had not engaged in conduct protected from retaliation under the ADEA was not entitled to automatic standing to sue for retaliation by virtue of his marriage to another employee who alleged discriminatory dismissal.[63]

Inferring claims for retaliation under all anti-discrimination statutes also could have implications for the Individuals with Disabilities Education Act (IDEA), a federal statute that already engenders an extraordinary volume of litigation and other legal proceedings.[64] The First Circuit has recognized a retaliation claim under the IDEA,[65] notwithstanding the fact that, as one district court noted, "because the IDEA contains no retaliation provision, [p]laintiffs can have no viable distinct retaliation claim under the IDEA."[66] If third party causes of action are to be read into Title IX, and retaliation claims are read into IDEA, then school employees and other third party plaintiffs presumably will be able to allege retaliation for school district acts or omissions in connection with IDEA.

The effect of a ruling by this Court to reverse the Eleventh Circuit in this case could extend beyond the

[62] 327 F.3d 307 (4th Cir. 2003).
[63] 89 F.3d 1224 (5th Cir. 1996), *cert. denied* 520 U.S. 1229 (1997).
[64] *See* Perry A. Zirkel and Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 WELP 731 (2002).
[65] *See Weber v. Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2000). Like many courts and parties, the First Circuit considered the issue as one of standing rather than of cause of action. *See generally, Davis v. Passman*, 442 U.S. 228, 239 n. 18 (distinguishing between standing and cause of action); *Holt*, 89 F.3d at 1229-30 (Dennis, J., dissenting) (citing *Davis v. Passman* and arguing that majority confused concepts of standing and cause of action).
[66] *P.N. v. Greco*, 282 F. Supp. 2d 221, n.3 (D.N.J. 2003).

employment context and beyond anti-discrimination statutes. Unless such a ruling were narrowly written, it might be asserted in retaliation claims wherever any alleged adverse consequence to any plaintiff somehow can be equated with statutorily proscribed "discrimination" against the protected class or where inferring such an implied cause of action arguably would further the policy purposes of the underlying statute.[67]

The Court's approach in this case to the question of inferring Congressional intent has potential implications for other jurisprudential contexts where discerning legislative statutory intent can be dispositive as to whether a claim may proceed. In order to abrogate state sovereign immunity under the Eleventh Amendment, for example, Congress must clearly manifest its intention to do so.[68] Local school boards in California,[69] Maryland,[70] and South Carolina[71] have been deemed "arms of the state" for Eleventh Amendment sovereign immunity purposes, and the Hawai'i Board of Education is a state agency.[72] Beyond the federal realm, state courts sometimes construe claims under state statutory or common law remedies for discrimination claims by reference to federal courts' approach to analogous federal claims.[73]

The Court should consider cautiously the implications of Petitioner's argument that, in a Title IX case, a plaintiff who is not the alleged victim of discrimination must have a cause of action because he or she frequently may be the "only effective adversary."[74] This same line of reasoning could extend to other statutory contexts anytime the alleged victims are children or others who are arguably at some disadvantage, making not just their parents and guardians, but also employees and undefined others, into potential plaintiffs who can allege violations and threaten lawsuits.[75] This kind of justification was, in fact, among the rationales cited by the First Circuit in its decision to

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[67] Petitioner cites dictionary definitions of "basis" to argue that as long as sex played some role as a "supporting element" or "underlying condition" or "circumstance" in the events leading to a retaliation claim, the retaliation itself constitutes impermissible discrimination "on the basis of sex." See Brief of Petitioner at 17. This approach to defining what constitutes discrimination on the basis of a suspect classification would encompass a wide array of situations.

[68] *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

[69] *See, e.g., Belanger v. Madera Unified Sch. Dist.*, 963 F.3d 248, 254 (9th Cir. 1992).

[70] *See, e.g., Doe v. Board of Educ. of Montgomery County*, 453 A.2d 814, 822 (Md. 1982) (holding that Maryland school boards can invoke Eleventh Amendment sovereignty immunity defense as to claims in excess of $100,000).

[71] *See Smith v. School Dist. of Greenville County*, 324 F. Supp. 2d 786 (D.S.C. 2004).

[72] *See* HAW. REV. STAT. § 26-35.5 (2003).

[73] *See, e.g., Wolfe v. Becton Dickinson & Co.*, 662 N.W. 2d 599, 603-05 (Neb. 2003) (weighing state whistleblowing and retaliation claims with reference to U.S. Supreme Court and federal circuit court rulings regarding federal retaliation claims).

[74] *Sullivan*, 396 U.S. at 237 (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)).

[75] In addition to other problems with this rationale (*see supra* Part I.C.), it amounts to a bootstrapping argument. The Court has made clear that in the absence of clear statutory language the touchstone is legislative intent: "Without it, a cause of action does not exist and courts may not create one, no matter how desirable that may be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87; *see also Holt v. JTM Industries, Inc.*, 89 F.3d 1224, (5th Cir. 1996) (acknowledging possible risk that employee could be target of retaliatory action prompted by spouse's protected actions as employee, but holding that ADEA's plain language will suffice to protect employees and that, "[i]f we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation"), *cert. denied* 520 U.S. 1229 (1997). Petitioner's approach effectively would recast any compelling policy argument as obvious evidence of legislative intent, rendering meaningless the Court's repeated admonitions.

permit retaliation claims to proceed under the Rehabilitation Act and IDEA.[76]

C. A rule of statutory construction requiring that wide reaching causes of action be inferred in anti-discrimination statutes would inflict additional burdens on educational institutions.

Reading third party causes of action into Title IX and other anti-discrimination statutes would further complicate the already daunting task schools boards and school administrators confront in disciplining and dismissing teachers and other school personnel. The process of terminating public school employees is especially costly and time consuming, as numerous cases, studies, and news articles reflect.[77] In a recent survey,

[76] See *Weber*, 212 F.3d at 48-49 (surmising that Congress intended to provide cause of action for retaliation to non-disabled advocates and that this was in apparent recognition of disabled individuals' need for assistance).

[77] *See, e.g., Cooper v. Oak Park Sch. Dist.*, 624 F.Supp. 515 (E.D. Mich. 1986) (resolving case that took seven years from initial disciplinary hearing to resolution and generating 2,200 page transcript at initial disciplinary hearing stage alone); *Beebee v. Haslett Pub. Schs.*, 278 N.W.2d 37 (Mich. 1979) (resolving case in district's favor 11 years after teacher's discharge); *Proposed Termination of James E. Johnson's Teaching Contract with Indep. Sch. Dist. No. 709*, 451 N.W.2d 343 (Minn. App. 1990) (addressing case in which 83 witnesses called, 157 exhibits received in evidence, and transcript filled 29 volumes containing 6,455 pages); *Greendale Educ. Ass'n v. Greendale Sch. Dist.*, 655 N.W.2d 546 (Wis. App. 2002), *unpublished decision*, (resolving dismissal of teacher after five years, including arbitration hearing lasting 10 days in which 61 witness called). *See also* Jeffery Handelman & Heather Adams, *Disciplinary Process Shorter, Less Costly for Districts*, NEW YORK STATE SCHOOL BOARDS, July 21, 1997 (reporting 1997 study of New York State school districts that found that it takes on average 319 days from time school board brings disciplinary charges until hearing officer reaches decision, at average cost of $94,527); Keith Ervin, *Fired, Rehired: Teacher Tenure Stirs Debate*, SEATTLE TIMES, Aug. 6, 2003 (reporting teacher termination

only four percent of superintendents and three percent of principals reported that it was "relatively easy to fire a tenured teacher, even if the teacher was terrible in the classroom."[78] Sixteen percent of superintendents and 30 percent of principals said this was all but impossible.[79] As with less drastic actions that may be challenged as retaliatory, terminating school employees takes so long and is so expensive because of the formidable array of constitutional, statutory, regulatory, and, often, collective bargaining protections such employees typically enjoy.[80]

The formal protections,[81] frequently vigorous union representation,[82] and practical realities[83] sometimes combine to complicate effective personnel management. As administrators gather evidence and documentation, as attorneys are retained to represent both parties, as hearings and appeals are conducted, as teachers continue to collect pay while on administrative leave pending resolution of the matter, school officials are confronted with an unenviable choice: to tolerate the teacher's shortcomings or transfer him or her from position to

case that lasted two years, resulted in 22 days of hearings, and cost school district over $500,000).

[78] STEVE FARKAS ET AL., ROLLING UP THEIR SLEEVES, SUPERINTENDENTS AND PRINCIPALS TALK ABOUT WHAT'S NEEDED TO FIX PUBLIC SCHOOLS 32 (Public Agenda 2003).

[79] *See id.*

[80] See *supra* Part I.D.

[81] The burden of proof in teacher termination cases often is on the school district. *See* BRIDGES, *supra* note 30.

[82] *See* Michael Chapman, *Why Bad Teachers Can't Be Fired: Unions Defend Tenure—At Students' Expense*, INVESTOR'S BUSINESS DAILY, Sept 21, 1998.

[83] An exhaustive record of negative teacher evaluations and other written documentation of poor performance over time typically are necessary for successful dismissal. *See* Kelly Frels, et al., *Documentation of Teacher Performance*, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES AND TECHNIQUES 1-1 (National School Boards Association 1997). Such documentation often is wanting, owing to the time and resource constraints administrators face. *See* BRIDGES, *supra* note 30, at 19-57, 58-59.

position,[84] to offer the teacher a financial settlement to leave the district, which frequently will not prevent the teacher from working elsewhere,[85] or to expend the time, money, and emotion to see the termination through. While the third option may be most desirable to fulfill the school board's obligations to its students, responsible school officials must balance this imperative against the costs it entails relative to other district priorities in an era of lean school budgets.

The considerable legal difficulties many school districts encounter and apprehend even in routine matters of employee discipline already afford strong protection for employees from retaliatory acts and impose

[84] *See* Peter Schweizer, *Firing Offenses: Why is the Quality of Teachers So Low? Just Try Getting Rid of a Bad One*, NATIONAL REVIEW, Aug. 17, 1998 (quoting school attorney as observing that, "For a principal, it can seem a lot easier to hang onto the dead wood. Teachers are more protected than any other class of employees, with all the procedural rights that can drag a civil case out for years."); Rebecca Jones, *Showing Bad Teachers the Door*, AMERICAN SCHOOL BOARD JOURNAL (Nov. 1997), at 22 ("Many administrators decide it's not [worth the time and headache to terminate a teacher] and resort to the time-honored practice of transferring bad teachers from school to school or position to position. In what's known as the Dance of the Lemons (or, less elegantly, Passing the Trash), they try to wear down the teacher—or find a spot where the teacher's awfulness will do the least damage and draw the fewest complaints.").

[85] *See* Schweizer, *supra* note 84 ("Often, as a way to save time and money, an administrator will cut a deal with the union in which he agrees to give a bad teacher a satisfactory rating in return for union help in transferring him to another district. The problem teacher gets quietly passed along to someone else."). In 1992, the Detroit Free Press reviewed over 600 Michigan teacher tenure cases from the previous 10 years and more than 200 settlements of teachers who had resigned. The Free Press concluded that in many instances districts became so frustrated by the termination process that they worked out settlements to induce teachers to resign. Under many of these settlements, the circumstances leading to the districts' action were not made public and thus were obscured from prospective employers. Three settlements exceeded $100,000. *See* Joan Richardson & Margaret Trimer-Hartley, *Schools Pay to Get Rid of Problems: Instructors Can Dig in for Years*, DETROIT FREE PRESS, Mar. 25, 1992.

significant costs on school systems.[86] If, under the Court's decision in this case, any employee can even more readily don the mantle of champion of any protected group, and thereby can assert a retaliation claim, these difficulties and costs will be exacerbated.[87] Importantly, a retaliation claim is easier to assert than is a violation of the underlying statute itself.[88] It is relatively easy to make a *prima facie* case of retaliation to avoid summary judgment, shifting the burden of proof to the employer. Indeed, retaliation claims sometimes proceed even when the court determines that the employer in fact engaged in no impermissible discrimination.[89]

In light of the perhaps unmatched protections already available to school employees alleging employment retaliation, *Amici* urge the Court to be

[86] Although our discussion has focused on the most difficult, and most discussed and documented, challenge presented by teacher dismissals, even school district personnel actions short of dismissal are subject to many of the same legal complications and expenses.

[87] Employment retaliation claims have been on the increase. By way of illustration, the Equal Employment Opportunity Commission reports that charge filings with that agency for retaliation more than doubled from 11,096 in 1992 to 22,690 in 2003, or from 15.3 percent to 27.9 percent of total charges. *See* EEOC, *Charge Statistics FY 1992 to FY 2003*, *available at* http://www.eeoc.gov/stats/charges.html.

[88] *See Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 762 (2d Cir. 1998) ("It sometimes happens—more frequently than might be imagined—than an employee whose primary claim of discrimination cannot survive pre-trial dispositive motions is able to take to trial the secondary claim that he or she was fired or adversely affected in retaliation for asserting the primary claim."). *See also,* Lisa Cooney, Understanding and Preventing Workplace Retaliation, 88 MASS. L. REV. 3 (2003) ("Employees are more routinely filing discrimination claims in tandem with claims of retaliation since retaliation claims can survive even when the underlying discrimination claims have no merit.").

[89] *See, e.g., Crumpacker v. Kansas Dep't of Human Res.*, 338 F.3d 1163 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 1416 (Feb 2004), (holding that congressional authorization to pass prophylactic legislation to deter gender discrimination in workplace extends to prohibition of retaliation even when underlying Title VII claim has failed.).

especially mindful as it considers this case of the need to balance carefully the important purposes of federal anti-discrimination legislation "against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel."[90]

CONCLUSION

Reading more expansive causes of action for retaliation into Title IX is unnecessary to achieve the statute's purposes and would come at a significant cost to the nation's educational institutions, especially its public schools. The need to distinguish between statutorily protected actual victims of discrimination and third party plaintiffs is wholly consistent with Congressional intent and need be no more mystifying to the nation's courts and need confront them with no more "subtle fact distinctions"[91] than do the other determinations as to whether a plaintiff has standing or is a member of a protected class—indeed, perhaps less so.[92] The District Court and the Court of Appeals were able to determine without too much difficulty that a Title IX retaliation claim was not Petitioner's appropriate remedy in this case. *Amici* urge this Court to affirm.

Respectfully submitted,

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[90] *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259-260 (4th Cir. 1998) (quoting *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir.1976)).

[91] Brief of Petitioner at 41.

[92] *See supra* n. 65.

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IN THE
Supreme Court of the United States

RODERICK JACKSON,
PETITIONER,

v.

BIRMINGHAM BOARD OF EDUCATION,
RESPONDENT

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF NATIONAL WRESTLING COACHES ASSOCIATION IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae National Wrestling Coaches Association ("NWCA"), a nonprofit Iowa corporation headquartered in Manheim, Pennsylvania, Through its institutional and individual members, NWCA represents student-athletes, parents, coaches, booster groups, save-our-sport groups, and alumni nationwide. Since its founding in 1928, *amicus curiae* NWCA has supported amateur wrestling at the interscholastic, intercollegiate, and club levels. Since 2002, that support has included advocacy on issues under Title IX.

This litigation raises important questions for NWCA's members and its mission. While some of its coach members would prefer the blanket legal protections sought by Coach Jackson, NWCA's coach members also support its campaign to bring balance back to Title IX implementation and enforcement. Simply put, it risks driving schools out of athletics altogether to allow a suit to continue under a complaint that (a) does not state a claim under Title IX for retaliation *because of gender*, (b) does not even allege any underlying discrimination *because of gender*, and (c) fails to comply with the regulatory prerequisites for a regulation-based suit.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amicus curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court.

ISSUE PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), encompasses redress for retaliation for complaints about unlawful sex discrimination?

SUMMARY OF ARGUMENT

Patterned on the Civil Rights Act of 1964's Section 601, Title IX's Section 901(a) broadly provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). By its terms, Title IX's sweep extends only to discrimination "on the basis of sex" (*i.e., because of gender*). *Id.* While it has interpreted the sweep of Section 901(a) broadly to include employment and sexual harassment, *e.g., Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74 (1992) ("when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"), this Court never has read the "because of gender" requirement out of the statute.

If the manifest sexual abuse in *Oncale v. Sundowner Offshore Services, Inc.* nonetheless required a showing that it "actually constituted "*discrimina[tion]* . . . because of . . . sex," 523 U.S. 75, 81 (1998) (emphasis and ellipses in original) under Commerce-Clause and Fourteenth-Amendment legislation like Title VII, then there is no question that the failure to satisfy the "because of gender" requirement is dispositive under Spending-Clause legislation like Title IX. In summary, *amicus curiae* NWCA makes three principal arguments:

1. Retaliation for advocacy on behalf of third parties is not discrimination *because of gender* cognizable under Title IX.

2. Such retaliation would not qualify for an implied private right of action, even if this Court undertook its now-disfavored implied-right analysis.

3. Schools have no notice of liability for such retaliation, which precludes liability under Spending-Clause legislation like Title IX.

Significantly, under the foregoing framework, anyone (third party or not) retaliated against *because of their gender* has an action under Title IX. But no-one, including Coach Jackson, has an action for conduct that does not violate Title IX's gender-based discrimination standard. Similarly situated coaches could, however, sue under the First Amendment or under Title VII. Finally, *amicus curiae* NWCA attempts to rebut various factual misstatements made by *amici curiae* in support of Coach Jackson, which could do mischief if propagated *ex cathedra* by this Court without the benefit and direct focus of an adversary proceeding.

FACTUAL BACKGROUND

Amicus curiae NWCA adopts the facts reported in the Eleventh Circuit's decision. 309 F.3d at 1335-36. In addition, the complaint does not allege several essential elements of a Title IX retaliation claim: (a) that Birmingham is a recipient of federal education-related funds; (b) that Coach Jackson's complaining caused Birmingham to retaliate; (c) that Coach

Jackson first filed (or otherwise participated in) an administrative complaint; (d) that Birmingham acted because of gender, either against Coach Jackson or against the girls' basketball team, and (e) that Birmingham treated boy athletes any differently with respect to expense accounts, equipment, and padlocks.

ARGUMENT

I. THIRD-PARTY RETALIATION IS NOT GENDER DISCRIMINATION

Title IX prohibits only intentional discrimination *because of gender*, which does not encompass retaliation because of speech. Section 902 does not authorize agency regulations to prohibit such retaliation.

A. Title IX Adopts the Constitutional, Intentional-Discrimination, Gender-Based Standard

Like Title VI, Title IX addresses intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 282 & n.2 (2001). Its legislative history makes clear that Title VI merely restates constitutional law and establishes a process to implement that law to ensure that the federal government did not support race discrimination through federal funding. *See, e.g.*, 110 Cong. Rec. 13,333 (1964) ("there is a constitutional restriction against discrimination in the use of Federal funds; and Title VI simply spells out the procedure to be used in enforcing that restriction") (Sen. Ribicoff).[2] As its text and

[2] *See also, e.g.*, 110 Cong. Rec. 5254 ("The existing law of the land is stated in section 601") (Sen. Humphrey); 110 Cong. Rec. 5255 ("No new

(Footnote cont'd on next page)

legislative history make clear, *compare* 20 U.S.C. § 1681(a) *with* 42 U.S.C. § 2000d; 117 Cong. Rec. 30,404 (1971) (Sen. Bayh), Title IX adopts the Title VI model.

B. Third-Party Retaliation Does Not Fall within Title IX's Discrimination Standard

With Title IX's statutory prohibition plainly and expressly limited to intentional discrimination *because of gender*, 20 U.S.C. § 1681(a), Title IX simply does not cover retaliation because of a non-gender reason (here, third-party advocacy). This Court frequently relies on Title VII precedents where applicable to its Title IX jurisprudence, *e.g., Davis v. Monroe County Board of Education*, 526 U.S. 629, 640 (1999) (*citing Oncale*, 523 U.S. at 82, *and Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)), and this Court should do so here.

As Title VII's legislative history makes clear, far from an integral element of the statutory "discrimination"

(Footnote cont'd from previous page.)

rights are granted here nor are any taken away") (Sen. Humphrey); 110 Cong. Rec. 6553 ("[the bill] provides that race shall not be a basis for making decisions") (Sen. Humphrey); 110 Cong. Rec. 7064 (confirms question that Title VI is already the law) (Sen. Pastore); 110 Cong. Rec. 13,442 ("Section 601 is a policy statement on constitutional law") (Sen. Humphrey). Senators Humphrey and Kuchel were the floor managers for the Civil Rights Act of 1964, Senators Cotton and Pastore were the floor managers for Title VI, Senators Case and Clark were the floor managers for Title VII, Representative Celler and McCulloch were the floor managers in the House, and Senators Ribicoff and Javits participated with the bipartisan leadership on Title VI.

protection, retaliation protection for third-party advocacy is "ancillary." 110 Cong. Rec. 7213 (1964) (prepared statement submitted jointly by floor managers for Title VII, Sen. Clark and Sen. Case); *cf. Great American Federal Sav. & Loan Ass'n v. Novotny,* 442 U.S. 366, 387-88 (1979) ("retaliation for efforts to aid others" is distinct from "discriminat[ion] on the basis of . . . sex") (White, J. dissenting). By including this "ancillary" provision in Title VII, but not in Title VI, Congress implicitly foreclosed a third-party retaliation action under Title VI, and thus Title IX.

Not all retaliation is retaliation *because of gender,* just as not all harassment is *sexual* harassment.

> Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at "*discriminat[ion]* . . . because of . . . sex." We have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

Oncale, 523 U.S. at 81 (emphasis and ellipses in original, citations omitted). Likewise, the crucial issue for Title IX (or Title VI) is the statutory text, which prohibits all discrimination – including retaliation – *because of gender* (or race), but not all retaliation.[3]

Although *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969) predates Title IX, it postdates Title VI. Thus, Congress would have expected this Court to interpret Title IX consistent with its template (Title VI) rather than a much different statute, adopted under the different (and far more remedial) authority of the Thirteenth Amendment. Thus, the Court should reject again the "contemporary legal context" argument, *Sandoval,* 532 U.S. at 288, and instead should "focus not on the similarities of the two provisions, but on their differences." *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 354 (1993) (*comparing* U.S. CONST., Amend. XIV, § 1 *with* 42 U.S.C. § 1985(3)) (O'Connor, J., dissenting).

The *Sullivan* statute provides a more complete and more affirmative grant of rights than do Title IX and Title VI. *Compare* 42 U.S.C. § 1982 *with* 20 U.S.C. § 1681(a) *and* 42 U.S.C. § 2000d. Whereas the two Spending-Clause statutes apply only to specific types of discrimination (because of gender or of race), committed only by recipients of federal funds, the Thirteenth-Amendment statute far more broadly and affirmatively grants rights against actions by all private parties. *See Bray,* 506 U.S. at 354. Under this analysis,

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[3] Actions taken because of gender are those where "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part *'because of,'* not merely *'in spite of,'* its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279 (1979) (footnote and citations omitted, emphasis added).

Sullivan provides no basis to infer a private right of action for third-party retaliation under Title IX.[4]

C. Agencies' Section 902 Authorization Is Less Broad than Section 901(a)'s Prohibition

In *North Haven Bd. of Educ. v. Bell,* this Court upheld Title IX employment regulations, giving Title IX a sweep as broad as Section 901(a)'s prohibition against intentional gender-based discrimination. 456 U.S. 512, 521 (1982). Conversely, of course, no section of any statute has a sweep *more broad* than its language and history. And all statutes must be read to include all sections. *Amicus curiae* NWCA submits that *North Haven* failed adequately to consider the statutory language and legislative history of Section 902. Although that failure may not have affected the ultimate outcome in *North Haven,* it could have meaningfully affected the terms of the decision.

Specifically, *North Haven* compared the interplay of Title IV's Section 601 and 604 with Title IX's Section 901(a) and no analogue to Section 604 (the conference committee removed it from the House bill). 456 U.S. at 527-30. The Court failed to consider that Section 902 and Section 602 expressly limit agencies' rulemaking authority to rules "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682; 42 U.S.C. § 2000d-1. The legislative history makes clear that the language *limited,* rather than expanded, agencies' authority: for example, it prevented the regulation of both the farm employment practices of a recipient of crop subsidies and the general employment practices of a contractor who does not discriminate on its government contracts. *See, e.g.,* 110 Cong. Rec. 1521 (Rep. Celler) ("Title VI would not require action to end discriminatory employment practices by farmers receiving allotments"); 110 Cong. Rec. 1602 (Rep. Mathias); 110 Cong. Rec. 6545-46 (Sen. Humphrey); 110 Cong. Rec. 11,941 (letter from Attorney General Kennedy submitted by Sen. Cooper). Significantly, all of the foregoing legislative history *predates* Section 604's appearing in Senator Dirksen's amendment in the nature of a substitute. 110 Cong. Rec. 11,926, 11,930 (Amendment 656).[5]

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[4] Several *amici curiae* raise the concern this Court's sexual-harassment caselaw requires victims to notify the school before the school becomes liable, which requires that students feel free from retaliation before they can redeem their protection from harassment. However harsh it may appear, "private rights of action to enforce federal law must be created by Congress [and] courts may not create [them], no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval,* 532 U.S. at 286-87. In practice, moreover, the harassment-notice requirement is neither harsh nor in conflict with Birmingham's position here. The harassment victim must notify a school official high enough to take action to correct the harassment. *Gebser v. Lago Vista Independent School District,* 524 U.S. 274, 285 (1998). However that official responds, the harassment victim discharges the *Gebser* obligation by that notice. If, after notice, the school fails to meet its obligations, the harassment victim has a private cause of action against the school under *Gebser.* Adding or subtracting a separate and additional private right for retaliation does not materially alter the outcome. Further, dual harassment-retaliation victims at public schools likely could bring a separate equal-protection action for the retaliation. *See, e.g., Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000).

[5] *See also* 110 Cong. Rec. 12,689 (1964) (Sen. Saltonstall).

As Senator Bayh acknowledged, Title IX would have the same procedural protections afforded under Title VI, 118 Cong. Rec. 5803,[6] and Section 602's protection against bureaucratic overreaching was a vital one of those protections. *See, e.g.*, 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 7059 (Sen. Pastore). Thus, the Title IX conference committee's omission of Section 604 from Title IX merely constitutes the removal of redundant language. *See North Haven*, 456 U.S. at 546-50 (Powell, J. dissenting); 110 Cong. Rec. 12,707 (1964) (Section 604 merely "expressed in specific legislative language what had always been intended") (Sen. Humphrey). The upshot is that – whether or not this Court rightly decided *North Haven* – neither the *North Haven* analysis nor the relevant statutes give the Department any authority over retaliation, outside the Department's own administrative proceedings.[7]

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[6] *See also* 118 Cong. Rec. 5808 ("These provisions [including what became Section 902] parallel Title VI of the 1964 Civil Rights Act") (fact sheet submitted by Sen. Bayh); *see also* 1975 Hearings, at 170 ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh).

[7] *Cf. Waters v. Churchill*, 511 U.S. 661, 694-95 (1994) ("Every American has the right to express an opinion [but] the exercise of that right may entail unpleasant consequences [absent] some contractual or statutory provision limiting [the employer's] prerogatives") (Stevens, J., dissenting). As indicated in Section IV, *infra*, however, Coach Jackson had a cause of action under the First Amendment, which it declined to bring.

II. THIRD-PARTY RETALIATION LACKS AN IMPLIED PRIVATE RIGHT OF ACTION

In 1979, this Court determined that Title IX implies a private right of action to enforce Section 901(a)'s statutory prohibition against intentional, gender-based discrimination. *Cannon v. University of Chicago*, 441 U.S. 677, 687-88 (1979). In 2001, this Court rejected an invitation to apply the now-disfavored, implied-rights analysis to enable third-party beneficiaries to enforce regulations that exceed the statutory prohibition. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (declining to expand implied private action because "[h]aving sworn off the habit of venturing beyond Congress's intent, we will not accept [the] invitation to have one last drink").

To the extent that the Court would consider it, the *Cannon* implied-right analysis would not provide Coach Jackson with an implied right here. That analysis involves a four-factor test: (1) did Congress enact the statute for the "*especial* benefit" of this plaintiff class; (2) does the legislative history explicitly or implicitly indicate an intent to create or to deny a remedy; (3) is it consistent with the legislation's purpose to imply a remedy for the plaintiff; and (4) would it be inappropriate to infer an action solely on federal law (*e.g.*, does the area traditionally fall under state law). *Cannon*, 441 U.S. at 688-89 & n.9 (emphasis in original). Under these criteria, Title IX would not support an implied private remedy for third-party retaliation, even if the Court were inclined to conduct the analysis.

In its threshold question of the benefited class, *Cannon* contrasted statutes such as Title IX and the Voting Rights Act of 1965 (which provide that no person shall suffer the

identified statutory harm) with criminal statutes (which enacted prohibitions designed to benefit the general public). *Cannon*, 441 U.S. at 689-91 (citing cases). Unfortunately, Congress expressly tailored Title IX and Title VI to provide the right to be free from gender and race discrimination, 20 U.S.C. § 1681(a), 42 U.S.C. § 2000d, without including the full panoply of other rights (*e.g.*, freedom of speech, freedom from arbitrary and irrational actions). *Cf. Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 572 (1968) (speech); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (arbitrary state action).[8] By their terms, therefore, neither Title IX nor Title VI evince any intent (much less an *especial* intent) to protect individuals from third-party retaliation. Further, the anti-retaliation regulation is cast more in terms of proscribing conduct by recipients, 45 C.F.R. § 80.7(e) ("No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual"); 34 C.F.R. § 100.7(e), which correlates more closely to statutes that lack a private cause of action. *See Cannon*, 441 U.S. at 693 n.13 (citing cases).

In addition to failing at the threshold, an immediate right of action for third-party retaliation also conflicts with the administrative exhaustion requirement of the most analogous express cause of action (Title VII). This strongly suggests a need to exhaust administrative remedies before upsetting

[8] Retaliation *because of gender* is simply a form of retaliation prohibited by Title IX. *Cf. Brillhart v. Philips Electronics North America Corp.*, 179 F.3d 1271, 1273 (10th Cir. 1999) (state-law retaliation claim may proceed where plaintiff claims she was "terminated *because* she was an 'uppity' *female*") (emphasis added).

Title IX's preference for voluntary resolution pursuant to Section 902. 20 U.S.C. § 1682; *see also* 45 C.F.R. § 80.8(d) (1972) ("No action to effect compliance by any other means authorized by law shall be taken until . . . the responsible Department official has determined that compliance cannot be secured by voluntary means"). Even if third-party retaliation could survive the threshold of the implied-right analysis, the 1972 Congress likely would have assumed that this Court would consider Title VII, Section 902, and the implementing regulations by including an administrative-exhaustion requirement within any implied private right of action. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A., 511 U.S. 164, 178-79 (1994).

III. SCHOOLS HAVE NO NOTICE OF LIABILITY FOR THIRD-PARTY RETALIATION

Spending-Clause legislation like Title IX requires unambiguous congressional notice to federal recipients before federal funds will entail liability. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). Title IX, the Eleventh-Circuit caselaw, the Title IX regulations, and the various sub-regulatory documents cited by Coach Jackson and his *amici curiae* provide no such notice for third-party retaliation.

A. Title IX's Statutory Terms Provide No Notice

As indicated in Section I.B, *supra*, retaliation for third-party advocacy is not discrimination *because of gender*, even if it is discrimination because of some other factor (*e.g.*, speech). Similarly, as indicated in Section II, *supra*, third-party retaliation would not provide Coach Jackson a private right of action even if the Court still implied rights of action. Accordingly, Title IX provides no statutory notice to

Birmingham that it faces retaliation liability for third-party retaliation claims.[9]

B. Title IX Caselaw Provides No Notice

For Birmingham, the persuasive authority in its jurisdiction holds that Title IX does not provide third-party retaliation claims. *Holt v. Lewis*, 955 F.Supp. 1385, 1389 (N.D. Ala. 1995), *aff'd*, 109 F.3d 771 (11th Cir.), *cert. denied*, 522 U.S. 817 (1997). As such, Birmingham lacked notice that it faced liability for the third-party retaliation claim that Coach Jackson attempts to set out in his complaint.

C. Title IX Regulation Provides No Notice

The regulations do not put Birmingham on notice of potential liability in this action for third-party retaliation because the regulations expressly provide that "No action to effect compliance by any other means authorized by law shall be taken until . . . the responsible Department official has determined that compliance cannot be secured by voluntary means." 45 C.F.R. § 80.8(d); 34 C.F.R. § 100.8(d). If it applies here, the *Cannon* implied private right of action falls within "any other means authorized by law" to secure compliance. But before Coach Jackson can enforce one provision of these regulations, he must comply with all conditions precedent under these regulations, which includes the Department's efforts to secure voluntary compliance. As a third-party beneficiary proceeding under the regulations, Coach Jackson cannot "cherrypick" from among the regulations he chooses to enforce. Because it dealt with a purely statutory action, the Court's *Cannon* decision is not to the contrary. *Cannon*, 441 U.S. at 688 n.8; *Sandoval*, 532 U.S. at 282 (*Cannon* to be a statutory violation).[10]

D. Agency Documents Issued outside Section 902 Have No Effect and, thus, Provide No Notice

The *amici* supporting Coach Jackson cite a variety of documents not promulgated pursuant to Section 902 (*i.e.*, published in the *Federal Register* and signed by the President). As such, pursuant to Section 902, the documents simply are not in effect and thus cannot provide notice to Birmingham. In this Section, *amicus* NWCA analyzes the presidential-approval requirement generally and then applies it to the principal authorities cited by *amici* in support of Coach Jackson.

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[9] As indicated in Section I.C, *supra*, the statutory prohibition against intentional discrimination can exceed the scope of agencies' authority. If the Court elects to hold that Title IX prohibits what Coach Jackson alleges, the Court can (and indeed should) do so without reference to the regulations, which exceed the agency's authority under Section 902 to the extent that they allow a claim for retaliation based on something other than gender.

[10] The regulation provides that the protection from retaliation extends not only to "any right or privilege secured by" Section 901(a) but also by "this part" (*i.e.*, by the regulations). 45 C.F.R. § 80.7(e); 34 C.F.R. § 100.7(e). To the extent that the Title IX regulations purport to create rights, those rights are not privately enforceable. *See Sandoval*, 532 U.S. at 291 (agencies cannot create rights); *cf. United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (agency regulations do not expand recipient's Title VI obligations under the intentional-discrimination standard).

With perhaps one limited exception not relevant here,[11] Title IX's Section 902 is identical to Title VI's Section 602. *Compare* 20 U.S.C. § 1682 *with* 42 U.S.C. § 2000d-1. With no controlling legislative history for Title IX, the legislative history of Section 602 provides the only basis to understand the scope of Section 902. As the statute and its legislative history make clear, an agency must effectuate the statute via rules, regulations, and orders of general applicability, 42 U.S.C. § 2000d-1, which do not become effective unless and until signed by the President in the *Federal Register*.[12] 42 U.S.C. § 2000d-1; 110 Cong. Rec. 2499-00 (1964) (Rep. Lindsay); *North Haven*, 456 U.S. at 522 n.12.[13]

[11] Senator Bayh said that Section 902 "permit[s] differential treatment by sex" only in "*very unusual* cases" where "such treatment is *absolutely necessary*," such as the need for privacy in locker rooms and classes for pregnant women. 118 Cong. Rec. 5807 (1972) (emphasis added). Congress did not discuss a similar standard for Section 602.This case, however, presents neither a "very unusual case" of "absolutely necessary" gender-based "differential treatment" nor the implementation of the statutory prohibition of intentional gender-based discrimination.

[12] In 1980, the President delegated the rule-approval and enforcement authority to the Attorney General. 45 Fed. Reg. 72,995 (1980) (Executive Order 12,250). In 1981, the Attorney General delegated enforcement authority (but not the rule-approval authority) to the Assistant Attorney General in charge of the Department of Justice's Civil Rights Division. 46 Fed. Reg. 29,704 (1981).

[13] As demonstrated by the following *partial* list, Title VI's proponents repeatedly cited presidential approval as the bulwark against bureaucratic overreaching. *See* 110 Cong. Rec. 5256 (Sen. Humphrey); 110 Cong. Rec. 6544 (Sen. Humphrey); 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 6749 (Sen. Moss); 110 Cong. Rec. 6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 Cong.

(Footnote cont'd on next page)

Although cited by numerous *amici* supporting Coach Jackson, this Court's *Darrone* decision offers no help. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984). As the Court noted, the *Darrone* regulations had been approved pursuant to Executive Order 12,250 and had been adopted by a subsequent Congress into the committee report for an amendment to the Rehabilitation Act (*i.e.*, to the statute in question). *Id.* Significantly, the Attorney General signed the *Darrone* regulations. *See* 46 Fed. Reg. 40,686, 40,687 (1981). By contrast, here Congress has not adopted the retaliation provision in a committee report and never even considered whether the regulatory provision provides for private (as opposed to agency) enforcement.[14] *Darrone*, 465 U.S. at 634. Similarly, the Rehabilitation Act at issue

(Footnote cont'd from previous page.)

Rec. 7058 (Sen. Pastore); 110 Cong. Rec. 7066 (Sen. Kuchel); 110 Cong. Rec. 7067 (Sen. Kuchel); 110 Cong. Rec. 7103 (Sen. Javits); 110 Cong. Rec. 11,941 (letter from Attorney General Kennedy, inserted by Sen. Cooper); 110 Cong. Rec. 12,716 (Sen. Humphrey); 110 Cong. Rec. 13,334 (Sen. Pastore); 110 Cong. Rec. 13,377 (Sen. Allott). Because no President or Attorney General has approved the Department of Education regulations, the Department of Health, Education, and Welfare's original Title IX regulations remain in effect. 20 U.S.C. § 3505(a).

[14] Several *amici curiae* in support of Coach Jackson note that Senator Bayh indicated that Title IX would be enforced like Title VI, which already included a regulatory prohibition against retaliation. This merely begs the question presented here. Until this Court's *Cannon* decision in 1979, it remained unclear whether Title IX implies a private right to enforce the statutory prohibition. Similarly, until this Court's *Jackson* decision in 2004 or 2005, it will remain unclear whether Title IX implies a private right to enforce retaliation regulations. None of this conflicts with Senator Bayh's comment that Title IX will be enforced like Title VI.

there does not have a presidential-approval provision like Section 902. Pub. L. No. 93-112, 87 Stat. 355 (1973). Thus, these documents fail to comply with Section 902, and under the plain language of Section 902, they have *no effect*, 20 U.S.C. § 1682, and thus warrant no deference and provide no notice.

1. Title IX Manual Has No Effect

Several briefs cite a manual prepared by the Civil Rights Division of the U.S. Department of Justice for the proposition that Title IX prohibits retaliation. *See, e.g.*, U.S. Br. at 17 (*citing* U.S. Dep't of Justice, Title IX Legal Manual, 57 (Jan. 11, 2001)). Prepared in the waning days of the Clinton Administration (and three months before this Court's *Sandoval* decision), three critical flaws render this document unworthy of deference, even if it had taken effect.

First, by its terms, the document is inapposite to actions that involve traditional educational institutions like Birmingham:

> this document is not intended to be a guide for Title IX enforcement with respect to traditional educational institutions such as colleges, universities, and elementary and secondary schools[.]

DOJ Manual, at 5. By expressly directing schools like Birmingham to ignore it, this document cannot provide notice of an interpretation that binds Birmingham.

Second, the DOJ Manual predates the April 2001 decision in *Sandoval*. Somewhat surprisingly, three years later in a *Sandoval*-related case, the United States cites the

DOJ Manual, notwithstanding that it relies on the following authorities for the proposition that an agency can adopt disparate-impact regulations: this Court's decisions in *Guardians Ass'n v. Civil Serv. Comm'n* and *Alexander v. Choate*, the *district court* decision in *Sandoval*, and a 1980 district-court case from Pennsylvania. *See* DOJ Manual, at 64 & n. 48.[15] This Court, however, reversed the *Sandoval* district court decision and noted that neither *Guardians* nor *Choate* held that agencies have such authority, which would be in considerable tension with the statute. 532 U.S. at 281-82. As such, the DOJ Manual cannot intelligently inform the debate here: namely, whether the retaliation regulation *defines*, as opposed to *expands*, the statute. Consistent with its pre-*Sandoval* vintage (and the government's position defeated in *Sandoval*), the DOJ Manual does not distinguish between Title IX the statute and Title IX the regulatory regime. Consequently, when the manual opines that "Title IX, like Title VI, recognizes three general types of prohibited discrimination" – namely, disparate treatment, disparate impact, and retaliation, *id.*, at 57 – the reader cannot know whether the writer considered retaliation enforceable under the statute or the regulatory regime. The writer did not consider the distinction even to exist.

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[15] The other district court case, *Haffer v. Temple Univ.*, 678 F. Supp. 517, 539 (E.D. Pa. 1987), also is no longer good law: it holds that agencies can adopt disparate-impact regulations, that private parties can not enforce them, and that private parties can prevail based on a showing only of disparate impact. *See Sandoval*, 532 U.S. at 291 (agencies cannot create rights); *Fordice*, 505 U.S. at 732 n.7 (agency regulations do not alter recipient's burden under the intentional-discrimination standard).

Third, and finally, the DOJ Manual appears to be an outcome-oriented attempt to create law, not a thoughtful attempt to explain law, and so warrants no deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). For example, apparently because the writer would prefer it to be true, the DOJ Manual provides that Congress issued Title VI (and thus Title IX) under the Equal Protection Clause of the Fourteenth Amendment. DOJ Manual, at 56-57 & n.32. In doing so, the writer cites a Fifth Circuit decision for a proposition that the Fifth Circuit did not hold.[16] The legislative history could not state more clearly that Congress adopted Title VI *solely* under the Spending Clause, 110 Cong. Rec. 1527 (1964) ("Title VI is not an exercise of regulatory authority over activities within the States . . . and its validity rests on the power of Congress to fix the terms on which Federal funds will be made available") (prepared analysis submitted by Rep. Celler when introducing his bill to the House);[17] *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640 (1999), and nothing in Title IX's legislative history distinguishes it from Title VI in this regard.

[16] Specifically, the DOJ Manual cites *Pederson v. Louisiana State Univ.*, 201 F.3d 388, 406 (5th Cir. 2000), *aff'd in part, rev'd in part*, 213 F.3d 858 (5th Cir. 2000). As part of its sovereign-immunity analysis, the *Pedersen* court asked whether Congress *could have enacted* Title IX pursuant to the Fourteenth Amendment, not whether Congress *did enact* Title IX pursuant to the Fourteenth Amendment. *See id.*

[17] *See also* 110 Cong. Rec. 6546 ("[Title VI] is not a regulatory measure, but an exercise of the unquestioned power of the Federal Government to 'fix the terms on which Federal funds shall be disbursed'") (Sen. Humphrey, *quoting Oklahoma v. Civil Service Commission*, 330 U.S. 127, 143 (1947)).

2. Harassment Guidance Has No Effect

Several briefs cite *Federal Register* notices issued by the Department of Education on sexual harassment: Sexual Harassment Guidelines, 62 Fed. Reg. 12,034, 12,044 (1997), and Proposed Revised Sexual Harassment Guidelines, 65 Fed. Reg. 66,092, 66,106 (2000). Although issued in the *Federal Register,* these documents nonetheless have not been approved pursuant to Section 902; thus, they have not taken effect. In addition, the November 2000 document is proposed, not final, which further argues against any deference. Finally, because both documents predate *Sandoval,* their statements that "Title IX" prohibits retaliation do not resolve this issue here because – consistent with its position in the *Sandoval* litigation and with the DOJ Manual – the Department of Education used "Title IX" and the "Title IX regulatory regime" interchangeably.

3. 1979 Policy Interpretation Has No Effect

Several briefs cite a *Federal Register* "policy interpretation" on intercollegiate athletics issues by the Department of Education's predecessor: 44 Fed. Reg. 71,413 (1979). In addition to the lack of presidential approval, the policy interpretation suffers two additional flaws that render it without effect and, thus, without notice. Unlike the original Title IX regulations, the 1979 policy interpretation never took effect under either Section 902 or the "laying before" provisions discussed in *North Haven.* Indeed, to avoid the need for presidential approval and a new rulemaking, in an Office of General Counsel opinion widely circulated at the time, the Department's predecessor took the position that the

policy interpretation was neither a "rule" nor an "interpretation," and thus did trigger any procedural requirements. *See* "HEW Policy Lacks Force of Law," *The NCAA News*, 1. 5 (Jan. 31, 1980) (certified archival copies on file with NWCA and with the complaint in No. 03-2588-EGS (D.D.C.).[18] Therefore, the policy determination did not continue in effect under the transition provisions of the act that created the Department of Education. *See* 20 U.S.C. § 3505(a) (only "rules" that were "in effect" on May 4, 1980 continue in effect). Because it did not comply with Section 902, and it did not survive the transition from the Department of Health, Education & Welfare to the Department of Education, the 1979 policy interpretation provides no notice to recipients.

IV. EDUCATORS HAVE RETALIATION REMEDIES

To justify the harshness of dismissal here and to answer the claims of various *amici curiae* who supported Coach Jackson, this Court should clarify that he had other remedies at his disposal. First, as an educator at a public school, Coach Jackson clearly could have brought this action under the First Amendment. *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563, 572 (1968); *Connick v. Myers*, 461 U.S. 138, 149 (1983).[19] Second, if he had cast himself as the *direct* victim of prohibited gender

[18] The *NCAA News* article is available at http://www.ncaa.org/news/1980/19800131.pdf.

[19] *Cf. also Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (the Equal Protection Clause enables a "class of one" to challenge a disparate treatment under a rational-basis analysis).

discrimination, Coach Jackson could have asserted a claim under Title IX or Title VII. As the master of his own complaint, however, Coach Jackson declined to bring those claims, leaving the Court with the interesting issues presented here.

Under Title IX, an educator can state a retaliation claim if he or she can allege to have suffered discrimination because of gender. For example, if a recipient retaliated against a male (or female) teacher for defending the rights of male (or female) students, but would not have done so against a female (or male) teacher defending the rights of female (or male) students, that teacher could bring an action directly under Title IX. Thus, like sexual harassment, retaliation is simply a form of intentional, gender-based discrimination prohibited by Title IX. 20 U.S.C. § 1681(a); *cf., e.g., Brillhart v. Philips Electronics North America Corp.*, 179 F.3d 1271, 1273 (10th Cir. 1999) (state-law retaliation claim may proceed where plaintiff claims she was "terminated *because* she was an 'uppity' *female*") (emphasis added).[20]

[20] If the facts support it, a coach or teacher can allege the direct injury of being an involuntary participant in a school's discrimination against athletes or students. Directly or indirectly, this may give the coach or teacher third-party standing to assert the equal-protection rights of the athletes or students. Upon prevailing under such a theory, the court's remedial powers (or DE's administrative process) presumably could require reinstatement. As indicated in the Factual Background, *supra*, however, Coach Jackson does not even allege that the girls' basketball team suffered discrimination under Title IX, much less that he suffered discrimination under Title IX.

Under Title VII, an employer that discriminates against third parties (*e.g.*, students, customers) can create a hostile work environment for its employees. Thus, for example, if a job forces a female (or male) teacher to tolerate sufficiently egregious treatment of female (or male) students, the teacher would have a viable Title VII claim. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (*citing* 45 Fed. Reg. 74,676 (1980) and *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).[21]

V. THIS COURT SHOULD NOT PROPAGATE MISSTATEMENTS BY *AMICI CURIAE*

The *amici curiae* briefs in support of Coach Jackson highlight why an appellate court generally should disregard extra-record material not subjected to an adversary proceeding below. Although this Court's May 2003 amendment to Rule 32 has saved the Court from serving as a repository for extraneous information lodged with the Clerk, the Internet enables parties and *amici curiae* to cite any self-serving document imaginable, which opposing parties and *amici curiae* ignore at their peril. The risk of this Court's placing its imprimatur on false or misleading information is simply too great not to respond.

Particularly at the administrative and nongovernmental-organization level, Title IX has been dominated for decades by one side of the debate. Since becoming involved with Title IX advocacy in 2002, *amicus curiae* NWCA has come to appreciate the intended and unintended irony of former Vice President Mondale's remark during the Reagan-Mondale debate in 1984:

> It's not what he doesn't know that bothers me. It's what he knows for sure that just ain't so.

Transcript of Louisville Debate Between Reagan and Mondale, *New York Times*, B4 (Oct. 8, 1984) (quoting Will Rogers). Vice President Mondale's intended irony certainly applies to Title IX: much of what goes for fact just is not so.

His unintended irony simply amplifies the point: Will Rogers is not the source for the quotation. *See* Suzy Platt (ed.), *Respectfully Quoted: a Dictionary of Quotations Requested from the Congressional Research Service*, 185 (Library of Congress 1989).

A. *Amici Curiae* Overstate Increases in Scholastic and Collegiate Athletic Opportunities

Several *amici curiae* briefs include widely published (but nonetheless significantly overstated) claims that girls' interscholastic athletic participation increased more than 800 percent and women's intercollegiate participation increased more than 400 percent since Title IX's enactment in 1972.

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[21] *Rogers* held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic customers: "the phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." *Rogers*, 454 F.2d at 238. As indicated in the Factual Background, *supra*, however, Coach Jackson does not even allege that the girls' basketball team suffered discrimination *because of gender*.

See, e.g., Amicus Curiae Br. of Women's Sports Foundation, *et al.*, at 13-14; Bayh Br. at 21-22.

The overstatement in girls' interscholastic growth results from understated data collected and published by the National Federation of High School Associations ("NFHSA") in 1972. Many states reported total athletes, without separate girls' and boys' totals. *See* NFHSA, 1971-72 Sports Participation Survey, at 77-85 (1972) (available from NFHSA; on file with NWCA).[22] For such states, NFHSA counted all athletes as boys. As a result, for example, boys accounted for more than one in three field hockey players in 1971-72, *id.* at 76, notwithstanding that U.S. field hockey was then and is now an almost entirely female sport. The data significantly undercount girls' 1971-72 participation because many states did not report participation by gender in 1971-72.

The overstatement in women's intercollegiate growth results from incomplete data. The sources cited by *amici curiae* compare reported participation at 722 schools in the National Collegiate Athletic Association ("NCAA") in 1971-72 versus participation in 1,319 schools in 1998-99. In addition, the NCAA acknowledges that its members' data are under-inclusive for sports in which NCAA did not sponsor sports championships (*i.e.*, all women's sports in 1971-72).[23]

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[22] The following states report no girl athletes: Alaska, California, District of Columbia, Illinois, Indiana, Iowa, Minnesota, Nevada, New York, Pennsylvania, and Utah. *Id.*

[23] NCAA, 1982-2003 Sports Sponsorship and Participation Report, at 10 (2004) (http://www.ncaa.org/library/research/participation_rates/1982-

(Footnote cont'd on next page)

See generally Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 558 F.Supp. 487 (D.D.C. 1983), *aff'd* 735 F.2d 577 (D.C. Cir. 1984). Finally, the data do not include the participation in the Association for Intercollegiate Athletics for Women, the preeminent women's intercollegiate athletic conference in 1971-72. For all the foregoing reasons, the data significantly undercount women's participation in 1971-72.

B. *Amicus Curiae* Misidentifies Title IX's Author and Codification

In his *amicus curiae* brief, former Senator Bayh claims to have authored Title IX as an amendment to the Higher Education Act of 1965. Bayh Br. at 13-15, 17 & n.8. If not for the legal import of the latter comment, *amicus curiae* NWCA could overlook the otherwise trivial oversight of the former comment.

Representative Edith Green of Oregon authored Title IX. *See, e.g.*, Comment, Implementing Title IX: The HEW Regulations, 124 Pa. L. Rev. 806, 808-09 & n.20 (1976). On April 6, 1971, on behalf of herself and Representative Perkins, Representative Green introduced Title IX in the House as part of the "Higher Education Act of 1971." 117 Cong. Rec. 9821 (1971) (it was Title X of the bill, as introduced). *Four months later*, on August 6, 1971, Senator Bayh attempted to introduce Title IX in the Senate as a floor

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(Footnote cont'd from previous page.)

2003/2003ParticipationReport.pdf) ("For sports in which the NCAA does not offer a championship, the data are even less likely to be precise").

amendment, 117 Cong. Rec. 30,399 (1971), which was ruled non-germane to the parallel legislation then pending in the Senate. 117 Cong. Rec. 30,415. On February 28, 1972, Senator Bayh re-introduced Title IX as a floor amendment in the Senate. 118 Cong. Rec. 5802 (1972). In the first sentence of his prepared statement to the 1975 hearings on the Title IX regulations, Senator Bayh identifies himself as the "Senate sponsor of Title IX." Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., at 168 (1975) (hereinafter "1975 Hearings").

Senator Bayh does not cite any authority (other than his purported authorship) to support his claim that Title IX, 20 U.S.C. §§ 1681-1688 (codified at Chapter 38), amended the Higher Education Act of 1965, 20 U.S.C. §§ 1001-1140d (codified at Chapter 28). No such authority exists. The legislative reports on what became the Education Amendments of 1972 describe it as an act to amend several enumerated acts (including the Higher Education Act of 1965 and several others) and for "other purposes." *See, e.g.*, S. Conf. Rep. No. 92-798, *reprinted in* 1972 U.S.C.C.A.N. 2608. The legislative history unambiguously places Title IX among the "other purposes." The House report's section-by-section analysis lists more than 60 amendments to the Higher Education Act of 1965, H.R. Rep. No. 92- 554, *reprinted in* 1972 U.S.C.C.A.N. at 2548-80, but does not include Title IX among those amendments, *id.* at 2566-67.[24] Similarly, neither

[24] *See also* S. Conf. Rep. No. 92-798, *reprinted in* 1972 U.S.C.C.A.N. 2671-72 (conference report); *compare* Pub. L. No. 92-318, §§901-907, 86 Stat. 235, 373-75 (1972) (Title IX does not mention of Higher

(Footnote cont'd on next page)

Senator Bayh's 1972 floor amendment nor Title IX (as enacted) mentions the Higher Education Act of 1965. *See* 118 Cong. Rec. 5802-14; Pub. L. No. 92-318, §§901-907, 86 Stat. 235, 373-75 (1972).[25]

However trivial these rebuttals may seem, they have both legal and practical significance. First, the statute that created the Department of Education did not transfer its predecessor's Title IX authority to the newly created department, but did transfer the predecessor's authority under the Higher Education Act of 1965. *See* 20 U.S.C. § 3441(a)(2)(B). As such, Senator Bayh's claim is directly relevant to whether the Department of Education can claim a delegation of legislative authority to implement Title IX. *See Amicus Curiae* Brief of College Sports Council, at 18-19 & n.11.

Second, after Title IX's enactment, as both a Senator and a private lawyer-lobbyist, Senator Bayh has served as a leading proponent of an expansive reading of Title IX. His *amicus curiae* brief ably presents his position. By contrast,

(Footnote cont'd from previous page.)

Education Act of 1965) *with id.* at § 1001, 86 Stat. at 375 ("Part A of the Higher Education Act of 1965 is amended . . ."));

[25] Senator Bayh mentioned to the Nixon Administration's "Higher Education Act," 118 Cong. Rec. 5804, but that refers to pending legislation, not the previously enacted Higher Education Act of 1965. *See also* 1975 Hearings, at 468 ("Title IX, viewed strictly, is a free-standing statute not an amendment to existing law") (letter from John B. Rhinelander, General Counsel of the Department of Health, Education & Welfare).

Representative Green remained a proponent of the moderate bill that she and her colleagues in the 92nd Congress enacted. *See, e.g.*, 117 Cong. Rec. 39,262 (1971) ("a quota system would hurt our colleges and universities [and I oppose them] even in terms of attempting to end discrimination on the basis of sex.") (Rep. Green accepting what became 20 U.S.C. § 1681(b) as a floor amendment); 1975 Hearings, 480 ("When funds for athletic departments come out of Federal grants, fees, and tax dollars, women students are to have equal opportunity with men, but intercollegiate sports financed by gate receipts is an entirely different matter and not covered by title IX") (quoting floor statement by Rep. Green).

CONCLUSION

Because it does not allege a violation of Title IX and, in any event, failed to follow the required administrative procedures, *amicus curiae* NWCA urges this Court to affirm the dismissal of Coach Jackson's complaint.

October 7, 2004

Respectfully submitted,

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(12)

No. 02-1672

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IN THE

Supreme Court of the United States

RODERICK JACKSON, *Petitioner*,

v.

BIRMINGHAM BOARD OF EDUCATION, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE NEW YORK LAWYERS FOR THE PUBLIC INTEREST, THE SOUTHERN POVERTY LAW CENTER, AND THE TRAINING AND ADVOCACY CENTER OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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IN THE

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RODERICK JACKSON,

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BIRMINGHAM BOARD OF EDUCATION,

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On Writ of Certiorari to the
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BRIEF OF AMICI CURIAE
NEW YORK LAWYERS FOR THE PUBLIC INTEREST, THE SOUTHERN POVERTY LAW CENTER, AND THE TRAINING AND ADVOCACY CENTER OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS SUPPORTING PETITIONER

INTEREST OF AMICI CURIAE

New York Lawyers for the Public Interest (NYLPI) is a non-profit law firm formed in 1976 to address the unmet legal needs of New Yorkers. In partnership with member law firms, corporate law departments, and other organizations, NYLPI defends the civil rights of New Yorkers in areas such as disability rights, environmental justice, and access to health care. NYLPI has appeared as counsel of record or as *amicus curiae* in numerous cases involving the civil rights guarantees provided by the Rehabilitation Act of 1973, 29

U.S.C. § 791 *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*

Founded in 1971 and located in Montgomery, Alabama, the Southern Poverty Law Center has litigated numerous civil rights cases on behalf of women, minorities, and other victims of discrimination. Its cases before this Court include *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977). The Center's work is focused on the Deep South, and it often litigates in the Eleventh Circuit.

The Training and Advocacy Center of the National Association of Protection and Advocacy Systems (TAC/NAPAS) provides training and technical assistance to the nationwide network of protection and advocacy agencies. Located in all 50 States, the District of Columbia, Puerto Rico, and the federal territories, protection and advocacy agencies must, under various federal statutes, provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings. The protection and advocacy system is the Nation's largest provider of legally based advocacy services for persons with disabilities. TAC/NAPAS is interested in this case because it involves the enforcement of civil rights laws.

This case concerns whether there is a private right of action to redress retaliation against those who identify, testify about, or complain of violations of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* The availability of a private right of action is essential to the efficacy of Title IX, the Rehabilitation Act, and Title VI, in protecting *amici*'s clients from unlawful discrimination and allowing them to enforce fundamental antidiscrimination guarantees without fear of retribution.[1]

[1] The parties have filed letters with the Clerk of the Court consenting to the filing of *amicus* briefs in accordance with Rule 37.3(a). Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

STATEMENT

1. Congress enacted Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, to combat sex discrimination in federally funded education programs and activities. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The Department of Education and the Department of Justice have issued regulations implementing Title IX. Those regulations state that Title IX's prohibitions extend to efforts to retaliate against individuals who identify, complain of, or challenge practices they believe to be discriminatory. Entitled "intimidatory or retaliatory acts prohibited," the regulations provide:

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by * * * the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

34 C.F.R. § 100.7(e) (incorporated by 34 C.F.R. § 106.71).

The Department of Education and the Department of Justice also have explained that the prohibition on retaliation originates in Title IX itself (rather than being a prophylactic regulatory prohibition). U.S. Dep't of Justice, *Title IX Legal Manual* 70 (Jan. 11, 2001) ("[A] recipient's retaliation against a person who has filed a complaint * * * violates Title IX."); Dep't of Education, *Sexual Harassment Guidelines*, 62 Fed.

Reg. 12,034, 12,044 (1997) ("[R]etaliation is prohibited by Title IX."); Dep't of Education, *Proposed Revised Sexual Harassment Guidelines*, 65 Fed. Reg. 66,092, 66,106 (Nov. 2, 2000) (same).

Title IX was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Title VI is part of a comprehensive effort to combat racial discrimination in federally funded programs. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d-1. When Congress enacted Title IX in 1972, federal regulations implementing Title VI expressly proscribed retaliation for asserting Title VI rights or otherwise participating in proceedings or investigations under Title VI. See, *e.g.*, 29 Fed. Reg. 16,274, 16,277 (1964) (Dep't of Agriculture) (codified as 7 C.F.R. § 15.7).

2. In 1993, respondent Birmingham Board of Education hired petitioner Roderick Jackson to teach physical education and to coach girls' basketball. Jackson eventually concluded that the Ensley High School girls' basketball team was being denied equal funding and equal access to athletic equipment and facilities; he protested that unequal treatment to his supervisors. Shortly thereafter, Jackson started receiving negative work evaluations. In May of 2001, he was relieved of his paid coaching duties. Jackson, however, remained employed as a physical education teacher. Pet. App. 3a.

In July of 2001, Jackson filed suit against respondent in the United States District Court for the Northern District of Alabama, alleging (among other things) that respondent had violated Title IX. The complaint alleged that respondent had retaliated against Jackson, removing him from his coaching position because he had complained about the discriminatory treatment of the girls' basketball team. Pet. App. 3a.

The magistrate judge recommended that the complaint be dismissed. Pet. App. 28a-33a. The magistrate stated that there was a "persuasive" argument for recognizing retaliation claims under Title IX, relying on the Fifth Circuit's decision in *Lowery* v. *Texas A&M University System*, 117 F.3d 242 (5th Cir. 1997). See Pet. App. 31a. Nonetheless, the magistrate felt obligated to dismiss the case because the district court had rejected retaliation claims under Title IX in *Holt* v. *Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995), a decision that was summarily affirmed by the Eleventh Circuit, 109 F.3d 771 (1997) (Table), cert. denied, 522 U.S. 817 (1997). See Pet. App. 31a-32a.

The district court adopted the recommendation of the magistrate judge, stating that its earlier decision in *Holt* v. *Lewis* was "persuasive." Pet. App. 27a. In "the absence of controlling Eleventh Circuit or Supreme Court authority holding that Title IX expressly or implicitly creates a private cause of action for retaliation," the court stated, it would adhere to its view that "Title IX does not create such a right." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-26a. The court of appeals assumed for purposes of argument that respondent had "retaliated against Jackson for complaining about perceived Title IX violations." *Id.* at 3a. But the court held that such retaliation is not actionable under a private right of action, citing *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Pet. App. 8a.

In *Sandoval*, this Court addressed whether "disparate impact" claims could be asserted through the private right of action provided by Title VI. The Court agreed that, under *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), violations of Title VI could be asserted through a private right of action. However, citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), and *Guardians Association* v. *Civil Service Commission of the City of New*

York, 463 U.S. 582 (1983), the Court observed that "it is beyond dispute—and no party disagrees—that" Title VI itself "prohibits only intentional discrimination" and does not proscribe disparate impacts. 532 U.S. at 280 (discussing Section 601); see *id.* at 281-283 (discussing Section 602). Because Title VI did not itself proscribe disparate impacts, the Court held, disparate impact claims cannot be asserted under Title VI's implied private right of action. *Id.* at 285-286.

The Court also rejected the argument that agency regulations prohibiting disparate impacts can give rise to a private right of action where the statute itself does not. 532 U.S. at 291. Even though regulations might validly proscribe conduct the statute does not reach, the Court concluded that such regulations cannot "conjure up a private cause of action that has not been authorized by Congress." *Ibid.* "Agencies may play the sorcerer's apprentice" by construing the statute Congress has entrusted to them for administration. They cannot, however, "play the sorcerer himself" by creating both a right and a private cause of action to enforce it that Congress has withheld. *Ibid.*

Relying on *Sandoval*, the court of appeals in this case declared that "legislative intent is the *only* basis upon which a private right of action may be inferred." Pet. App. 11a. Looking to the text of Section 901 of Title IX, 20 U.S.C. § 1681(a), the court found no indication that Congress intended a prohibition on retaliation to be enforceable through a private right of action. Section 901, the court stated, was textually silent about retaliation. Pet. App. 19a-20a. The court also found no basis for inferring a private right of action to challenge retaliation under Section 902, 20 U.S.C. § 1682. Although that provision establishes federal enforcement of Title IX, the court of appeals held that it does not include "rights-creating language" with respect to "gender discrimination, retaliation, or any other kind of harm." *Id.* at 21a.

The court of appeals also held that, "even if Title IX did aim to prevent and remedy retaliation for complaining about gender discrimination," Jackson "is not within the class meant to be protected by Title IX." Pet. App. 23a. According to the court of appeals, an individual complaining about gender discrimination in violation of Title IX is protected only if he or she is the victim of the underlying discrimination. *Id.* at 23a-24a. Consequently, anyone subjected to retaliation for having identified discrimination directed at others—or who suffers intimidation or retaliation for testifying in proceedings about discrimination directed against others—is not protected by the statute. *Ibid.*

SUMMARY OF ARGUMENT

I. Notwithstanding the court of appeals' astigmatic analysis, the issue in this case—whether there is a private right of action to challenge retaliation under Title IX—turns on a relatively straightforward question: Does Title IX, as authoritatively interpreted by the agencies entrusted with its administration, proscribe such retaliation? The answer is "yes." The legislative and historical background against which Title IX was enacted show that Congress intended the statute to proscribe retaliation; two federal agencies tasked with implementing Title IX have so construed it; and common sense dictates that the statutory protection against discrimination would be illusory if violators were free to punish the act of reporting it. Although the court of appeals relied heavily on *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), to reach the opposite conclusion, that case supports the rule that the agencies' determination—that Title IX itself proscribes retaliation—must be afforded deference. And *Sandoval* makes it clear that, when Congress both intends a statute to be privately enforceable and entrusts the statute to an agency for administration, it likewise intends the agency's authoritative construction of the statute to be privately enforceable.

II. Nor should this Court be concerned that acknowledging Title IX's ban against retaliation would leave federal courts awash in new claims. The available evidence suggests that, notwithstanding the importance of the prohibition on retaliation, its private enforcement does not unduly contribute to the volume of litigation. At the same time, the threat of private enforcement deters retaliation and encourages the adoption of procedures and policies that prevent retaliation and retaliation claims alike.

III. Finally, this Court should decline to engage the United States' misguided suggestion, made in its *amicus* brief at the petition stage, that *universal* retaliation somehow cures discrimination prohibited by Title IX and other federal antidiscrimination statutes. This case does not present any question concerning the hypothetical across-the-board retaliator. The government's resolution of that hypothetical, moreover, is unsupported by text, logic, or experience. It contradicts the government's position as set forth in its guidelines and manuals. Its adoption would threaten the government's law enforcement interests. And it would needlessly undermine the cause of sound judicial administration, displacing well-established rules and procedures with a metaphysical inquiry that defies concrete application.

ARGUMENT

I. Because Title IX Itself Proscribes Retaliation, Retaliation Claims Are Cognizable In Private Actions

A. Federal Agencies Have Correctly Construed Title IX To Prohibit Retaliation

It is by now "beyond dispute" that, just as private individuals "may sue to enforce Title VI" of the Civil Rights Act of 1964, they may sue to enforce the substantive guarantees of Title IX of the Education Amendments Act of 1972 (Title IX), 86 Stat. 373, as amended, 20 U.S.C. 1681 *et seq.* See *Alexander* v. *Sandoval*, 532 U.S. 275, 280 (2001). In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court

held that private individuals may sue to enforce Title IX under an implied private right of action. Seven years later, Congress "ratified *Cannon*'s holding." *Sandoval*, 532 U.S. at 280; see *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992) (Section 1003 of the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, "cannot be read except as a validation of *Cannon*'s holding."). Consequently, the only question in this case is whether Title IX proscribes the conduct identified in Jackson's complaint—retaliation for having identified or protested sex-based discrimination alleged to violate Title IX.

1. By its terms, Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). For decades, the federal agencies responsible for implementing that prohibition—including the Department of Justice and the Department of Education—have read it to encompass retaliation for having identified or complained of sex-based discrimination. Their regulations provide that no recipient of federal funding or any other person shall "intimidate, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by * * * the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part." 34 C.F.R. §§ 100.7(e), 106.71.

Significantly, those agencies have made it clear that Title IX *itself* prohibits retaliation; the prohibition on retaliation thus is a construction of the statute itself, not a regulatory prophylaxis that extends beyond the statutory mandate. The Department of Justice's *Title IX Legal Manual* (Jan. 11, 2001), for example, explains that "a recipient's retaliation against a person who has filed a complaint * * * *violates Title IX*." *Title IX Legal Manual* at 70 (emphasis added). The

Department of Education's *Sexual Harassment Guidelines* likewise provide that "retaliation is prohibited *by Title IX*." 62 Fed. Reg. 12,034, 12,044 (1997) (emphasis added); Dep't of Education, *Proposed Revised Sexual Harassment Guidelines*, 65 Fed. Reg. 66,092, 66,106 (2000) (same).[2]

2. The unexceptional conclusion that Title IX's prohibition on discrimination on the basis of sex encompasses retaliation for having identified or complained of sex discrimination is wholly consistent with Congress's evident understanding of the term "discrimination." For example, Section 516(d) of Title 38 of the United States Code authorizes disciplinary measures for employees "who engage in unlawful *employment discrimination, including retaliation* against an employee for asserting rights under an equal employment opportunity law." 38 U.S.C. § 516(d) (emphasis added). By barring "discrimination, including retaliation"—not "discrimination *and* retaliation"—Congress made clear in Section 516(d) that the term "discrimination" can "includ[e] retaliation * * * for asserting rights."

That construction, moreover, is reasonable (and the Eleventh Circuit's contrary view is not). The right to be free from discrimination means nothing if the likely consequence of asserting that right is punishment and retaliation rather than remediation. As the Department of Justice—the Nation's primary law enforcement agency—has observed:

> A right cannot exist absent some credible and effective mechanism for its enforcement and enforcement cannot occur in the absence of a beneficiary class willing and able to assert the right.

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[2] To the extent the agencies' regulations are ambiguous with respect to the source of the retaliation prohibition, the agencies' clarifications in manuals and other sources are "controlling unless plainly erroneous or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted).

Title IX Legal Manual at 70.. That observation applies with particular force to statutes prohibiting discrimination. Discrimination by its nature targets the underrepresented, marginalized, and disenfranchised. Such individuals cannot invoke their right to be free from discrimination if those infringing their rights may intimidate and punish to prevent the rights from being asserted.

This Nation's history with racial discrimination provides ample proof of that. When Congress enacted Title VI of the Civil Rights Act of 1964 to combat racial discrimination in federally funded programs, the Nation's history already was regrettably replete with instances of intimidation and retaliation directed against those who opposed discrimination. See Michael J. Klarman, *From Jim Crow to Civil Rights* 352 (2004) (reporting that the NAACP lawyers who brought desegregation cases had their homes bombed, and that "Mississippi blacks were also aware that 'the KKK tries your case long before it can get to the Supreme Court'"); *id.* at 353 (reporting that the organizer of "the original school desegregation suit in Clarendon County * * * was fired from his job as a public school teacher"); *ibid.* ("[T]hreats to close desegregated schools and to fire black teachers apparently deterred the NAACP from pressing the Clarendon County case" in North Carolina.); *id.* at 157 ("White witnesses who challenged Jim Crow norms were subject to intimidation."). Congress must have been aware of that history of retaliation both when enacting Title VI to combat race discrimination in 1964, and when modeling Title IX's bar on sex-discrimination in federally funded education programs after Title VI in 1972. Indeed, before enacting Title IX in 1972, Congress heard extensive testimony about retaliation against students and employees who protested sex discrimination in educational contexts. Pet. 17-18.

That history, moreover, demonstrates that the use of intimidation and retaliation to silence those who oppose discrimination is part of discrimination and critical to its per-

petuation. As the Fourth Circuit has observed, "[r]etaliation of this sort bears such a symbiotic and inseparable relationship to intentional * * * discrimination that an agency could reasonably conclude that Congress meant to prohibit both, and to provide a remedy for victims of either." *Peters* v. *Jenney*, 327 F.3d 307, 318 (4th Cir. 2003). In sum, discrimination and retaliation are one and the same, and Congress surely understood that when it enacted Title VI in 1964 and Title IX in 1972.

3. The longstanding view that Title IX's prohibition on sex-based discrimination encompasses retaliation for having complained of such discrimination is therefore reasonable and entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). That authoritative construction, moreover, resolves whether a private cause of action is available for retaliation claims. As this Court explained in *Sandoval*, when Congress intends a statute "to be enforced through a private right of action," it "intends the authoritative interpretation of the statute to be so enforced as well." *Sandoval*, 532 U.S. at 284.

B. Title IX's Origins Demonstrate That Congress Intended To Proscribe Retaliation

To the extent any doubt could remain, it is eliminated by the background against which Title IX was enacted. As this Court has observed, *Sandoval*, 532 U.S. at 280, Congress borrowed much of Title IX's text and structure from the already-established prohibition on race discrimination in Title VI of the Civil Rights Act of 1964. Title VI declares that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d-1. Immediately after Title VI was enacted, federal agencies adopted regulations expressly proscribing retaliation against individuals who asserted rights or

participated in proceedings or investigations under Title VI. See, *e.g.*, 29 Fed. Reg. 16,298, 16,301 (1964) (Dep't of Health, Education, and Welfare) (codified as 45 C.F.R. § 80.7(e) (1965); 45 C.F.R. § 80.7(e) (1971); 29 Fed. Reg. 16,274, 16,277 (1964) (Dep't of Agriculture) (codified as 7 C.F.R. § 15.7).

It is well established that, when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); cf. *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002) (re-enactment of "relevant provisions without change" is "further evidence * * * that Congress intended the Agency's interpretation, or at least understood the interpretation as statutorily permissible"); *Evans* v. *United States*, 504 U.S. 255, 260 n. 3 (1992) ("'[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'") (quoting Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

That canon of construction has particular force here. Title IX's drafters "patterned" Title IX after Title VI, *Sandoval*, 532 U.S. at 280, and expressed their expectation "that it would be interpreted and applied as Title VI had been," *Cannon*, 441 U.S. at 696. Moreover, just three years before Congress enacted Title IX, this Court construed 42 U.S.C. § 1982's prohibition on racial discrimination in the sale and rental of property to bar retaliation against those who complain about such discrimination. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969).

Thus, at the time Congress was enacting the anti-discrimination provision of Title IX, this Court and federal agencies alike were declaring that the prohibition on "discrimination" encompasses retaliation against those who

identify or complain of discrimination. Given that background, Congress certainly contemplated that Title IX's prohibition on sex discrimination in federally funded programs would encompass retaliation against those who assert the statute's protections.

C. *Sandoval* Confirms That There Is A Private Right Of Action To Challenge Statutory Violations

Although there is no dispute that a private right of action is available to enforce the prohibitions of Title IX, see pp. 8-9, *supra*, the decision below relied on *Alexander* v. *Sandoval*, *supra*, to conclude that retaliation claims are not privately enforceable. *Sandoval*, however, concerned whether there was a private right of action to challenge conduct that, under this Court's rulings, *did not violate the statute at issue, even as construed by the implementing agencies*. Here, in contrast, the question is whether there is a private right of action to challenge conduct (retaliation) that *violates* the statute.

In *Sandoval*, the plaintiff sought to assert a private right of action to challenge practices that had a disparate racial impact without proof of intent. This Court, however, already had held that Title VI itself "prohibits only intentional discrimination," a position with which "no party" in *Sandoval* "disagree[d]." 532 U.S. at 280; see *id.* at 286 n.6. Foreclosed from asserting a disparate impact claim under Title VI itself, the plaintiff in *Sandoval* sought to assert a private claim in court under agency regulations prohibiting activities with disparate impacts. 532 U.S. at 278.

The Court assumed the validity of the regulatory prohibition on disparate impacts, *Sandoval*, 532 U.S. at 281, and properly so: As in other contexts, Congress's decision to delegate to federal agencies express authority "to effectuate the provisions" of Title VI, 20 U.S.C. § 1682, encompasses authority to issue rules that sweep somewhat more broadly than the statute itself. Cf. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (recognizing that Congress, in exercising its

power to "enforce" the Fourteenth Amendment "by appropriate legislation," may enact laws to prevent violations by proscribing conduct that the Amendment itself would not prohibit). In *Sandoval*, however, the Court declined to hold that such purely regulatory or otherwise prophylactic prohibitions may be enforced through an implied private right of action. *Cannon* and Congress's amendments ratifying *Cannon* made it clear that *statutory* violations could be redressed through a private right of action. But the Court found no evidence "anywhere" in the statutory "text that Congress intended to create a private right to enforce *regulations*" barring conduct that Title VI permits. 532 U.S. at 291 (emphasis added); see *id.* at 292 (Congress's ratification of *Cannon* through Section 1003 of the Rehabilitation Act Amendments did not encompass regulatory claims, because the amendment "by its terms applies only to suits 'for violation of a *statute*,'" and "therefore does not speak to suits for violations of regulations that go beyond the statutory proscription.").

Here, in contrast, the federal agencies construing Title IX have not purported to establish a rule that goes beyond the statutory proscription. Instead, those agencies have construed Title IX *itself* as barring retaliation. See pp. 9-10, *supra*. *Sandoval* recognizes that such an agency interpretation, if valid, "authoritatively construe[s] the statute itself," making it "meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." 532 U.S. at 284. Instead, where Congress "intends the statute to be enforced through a private right of action," it "intends the authoritative interpretation of the statute to be so enforced as well." *Ibid.* (citing cases). Since Congress unquestionably intended Title IX "to be enforced through a private right of action," it likewise intended the responsible agencies'

decades-old "authoritative interpretation"—that Title IX prohibits retaliation—"to be so enforced as well."[3]

D. The Eleventh Circuit's Construction Undermines The Statute

The Eleventh Circuit's construction, moreover, would leave large and inexplicable gaps in Title IX and an array of other antidiscrimination laws. As explained above, the proscription on retaliation is indispensable to the efficacy of Title IX. Absent a credible enforcement mechanism and witnesses

[3] The Eleventh Circuit also relied on the fact that Title VII of the Civil Rights Act expressly proscribes retaliation in the employment context, while Title IX (like Title VI) does not explicitly mention retaliation. Even if one sets aside the obvious structural differences between those provisions, see Pet. 14; *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-436 (2002) (explaining that the presumption "that the presence of a phrase in one provision and its absence in another reveals Congress' design * * * grows weaker with each difference in the formulation of the provisions under inspection"), that at most shows that Congress *required* retaliation to be barred under Title VII, but left open for agency interpretation whether the discrimination prohibited by Title IX includes retaliation. Particularly where Congress expects an administrative agency to fill statutory gaps, "[n]ot every silence is pregnant"; silence may just signal Congress's "expectation that nothing more need be said in order to" permit the agency to adopt a construction that "effectuate[s] [the] legislative objective." *Burns* v. *United States*, 501 U.S. 129, 136 (1991) (quoting *State of Ill. Dep't of Public Aid* v. *Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)). Consequently, the courts of appeals have recognized that the canon of *expressio unius est exclusio alterius* is not appropriate in cases (such as this one) that involve an administrative agency's construction of a statute. *Texas Rural Legal Aid, Inc.* v. *Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) ("Whatever its usefulness in other circumstances * * * th[e] canon has little force in the administrative setting."); *Whetsel* v. *Network Prop. Servs., LLC*, 246 F.3d 897, 902 (7th Cir. 2001) (similar). That makes sense: An agency's interpretation must be given deference unless Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Silence generally does not "speak directly" to a matter. *Texas Rural Legal Aid*, 940 F.2d at 694; *Amax Land Co.* v. *Quarterman*, 181 F.3d 1356, 1365 (D.C. Cir. 1999).

who are able to provide evidence, Title IX's prohibition on discrimination means nothing. See pp. 10-11, *supra*; see also *Title IX Enforcement Manual* at 72 ("Retaliation claims * * * seek to ensure that rights created under a federal civil rights statute do not go unenforced for fear of adverse official reaction. This goal is undercut if recipients are allowed to retaliate against persons subject to their authority who publicly object to discrimination against others.") (footnote omitted).

The prohibition on retaliation is likewise indispensable to enforcement of other fundamental antidiscrimination guarantees. That includes Title VI, which prohibits racial discrimination, see pp. 10-11, *supra*, and the Rehabilitation Act of 1973, which prohibits discrimination based on disability. See 29 U.S.C. § 791 *et seq.* People with disabilities, for example, are especially vulnerable to intimidation and other tactics. As one sponsor of the Rehabilitation Act explained:

> [People with disabilities] represent a large minority group who have suffered a great many injustices. They face what seem to many insurmountable barriers. As a minority, [they] have always known exclusion—exclusion from an adequate opportunity to develop and contribute to their fullest capacity.

119 Cong. Rec. S13919 (July 18, 1973) (daily ed.).

Absent a privately enforceable prohibition on retaliation, people with disabilities would continue to know improper exclusion—exclusion from enforcing their rights under law without fear of retaliation or punishment. Unless victims of unlawful discrimination know they will be made whole should retaliation occur, their right to be free from discrimination becomes illusory. The federal courts therefore have construed the Rehabilitation Act to proscribe retaliation and have entertained private actions alleging such misconduct. See, *e.g.*, *Weber* v. *Cranston Sch. Comm.*, 212 F.3d 41, 47-48

(1st Cir. 2000); *Hoyt* v. *St. Mary's Rehab. Ctr.*, 711 F.2d 864, 865 (8th Cir. 1983). This Court should do likewise here with respect to Title IX.

II. Recognizing That Title IX Proscribes Retaliation Will Not Create Undue Litigation

A. The Prohibition On Retaliation Is Essential To Title IX But Infrequently Litigated

Although Title IX's prohibition on retaliation is crucial to its purpose—and private enforcement of that prohibition is an effective deterrent—such claims do not create undue litigation. To the contrary, although retaliation claims under Title VI, Title IX, and the Rehabilitation Act of 1973 have long been recognized by the courts of appeals, claims under those provisions have proved entirely manageable. Thousands of educational programs and institutions receive federal funds each year and are therefore subject to Title IX. According to the Department of Education's records, however, it has received an average of only 85 Title IX retaliation complaints per year during the last 10 years. See App., *infra*, 1a.

The number of claims that result in litigation may be smaller still. For example, although Title IX has been in effect for nearly 30 years, a search of decisions available on Westlaw reveals fewer than 140 reported Title IX decisions involving retaliation claims. Because almost all of those cases include both retaliation allegations and other discrimination claims, most of them probably would have been filed *even if* the retaliation claim were not independently actionable. Consequently, the prohibition against retaliation hardly creates an undue burden for the federal courts. Nonetheless, it performs indispensable functions. It ensures that those who endure discrimination *or witness it* are able to come forward by affording them confidence that there will be no retaliatory penalty or, if retaliation occurs, that they will be made whole. And it deters those who might otherwise be

tempted to conceal discrimination by intimidating witnesses and victims.

The above-cited numbers—which amount to fewer than 5 reported decisions a year nationwide—may overstate the effect on litigation in another way. In many of those cases, the plaintiff was an *employee* with a right to proceed under Title VII, which, all seem to agree, prohibits retaliation in the employment context. In other cases, the defendant was a state actor. It is well established that, because the First Amendment prohibits state actors from punishing or retaliating based on protected expression or petitions for redress of grievances, state-action retaliation is actionable under 42 U.S.C. § 1983. *Lowery*, 117 F.3d at 246 (noting that, after a Title IX retaliation plaintiff's claims were dismissed and leave to amend was denied by the district court, the plaintiff simply filed a separate lawsuit asserting claims under Section 1983); *Peters*, 327 F.3d at 322-323 (concluding that a retaliation plaintiff under Title VI had stated a separate retaliation claim under the First Amendment). Consequently, about sixty percent of the reported cases with Title IX claims that include retaliation allegations (86 of 136), either assert retaliation under both Title IX and other sources of law (such as Section 1983, Title VII, or state law), or assert it solely under sources other than Title IX.

Close examination of the reported decisions in circuits that have expressly recognized retaliation claims under Title IX reveals a similar pattern. For example, the Fifth Circuit explicitly recognized such a right of action in 1997 in *Lowery*, 117 F.3d at 254. We have identified only six reported Title IX cases asserting retaliation claims within the Fifth Circuit since. *Brooks* v. *So. Univ.*, No. Civ. A. 99-1828, 1999 WL 627385 (E.D. La. Aug. 16, 1999); *Doe* v. *Granbury Indep. Sch. Dist.*, 19 F. Supp. 2d 667 (N.D. Tex. 1998); *Flot* v. *Orleans Parish Sch. Bd.*, No. Civ. A. 96-3661, 1998 WL 915864 (E.D. La. Dec. 29, 1998); *Beasley* v. *St. Tammany Parish Sch. Bd.*, No. Civ. A. 96-2333, 1997 WL 382056

(E.D. La. July 9, 1997); *Doe* v. *Eason*, No. Civ. A. 98-2454, 1999 WL 765645 (N.D. Tex. Sept. 23, 1999); *Goins* v. *Hitchcock Indep. Sch. Dist.*, 191 F. Supp. 2d 860 (S.D. Tex. 2002), aff'd, 2003 WL 1922939 (5th Cir. 2003) (unpublished). Only three of those (*Brooks*, *Granbury*, and *Flot*) indicate that the retaliation claim was asserted under Title IX, and two of those three (*Granbury* and *Flot*) asserted retaliation under both Title IX and another source of law (Title VII and/or Section 1983).

The First Circuit embraced the availability of Title IX retaliation claims in *Frazier* v. *Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002). Nonetheless, we have found only one reported post-*Frazier* Title IX case with a retaliation claim; the retaliation claim, moreover, may have been asserted solely under Title VII. See *Laksham* v. *Univ. of Maine Sys.*, No. CV-03-52-BW, 2004 WL 1770706, at *17 (D. Me. 2004). Nor have trial courts in the Tenth Circuit, which recognized that Title IX's private right of action extends to retaliation in *Willner* v. *Budig*, 848 F.2d 1032 (10th Cir. 1988), cert. denied, 488 U.S. 1031 (1989), been overwhelmed with such suits. Although that decision is 16 years old, we have identified only four reported post-*Willner* decisions in the Tenth Circuit that explicitly premise retaliation claims on Title IX alone. *Morse* v. *Regents of the Univ. of Colo.*, 154 F. 3d 1124 (10th Cir. 1998); *Clay* v. *Bd. of Trustees of Neosho County Cmty. Coll.*, No. Civ. A. 94-2282, 1996 WL 370176 (D. Kan. June 19, 1996); *C.R.K.* v. *U.S.D.*, 176 F. Supp. 2d 1145 (D. Kan. 2001); *Cubie* v. *Bryan Career Coll.*, 244 F. Supp. 2d 1191 (D. Kan. 2003).

B. Invalidating The Agencies' Longstanding Construction Might Increase Litigation

Invalidating the agencies' longstanding prohibition on retaliation could actually increase the complexity and volume of litigation in several ways.

First, it may require federal courts to address otherwise potentially unnecessary but often difficult state-action questions. In many cases where state action is clearly absent, foreclosing the right to sue for retaliation under Title IX might leave victims with no remedy at all. But in many cases where the state action issue is closer, refusing to recognize a cause of action under Title IX will force federal courts to confront the same claims under Section 1983, see p. 19, *supra*, and therefore require them to resolve difficult state-action questions that might otherwise be avoided. See *Brentwood Academy* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295-296 (2001) (explaining that what "is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity"; that "no one fact can function as a necessary condition across the board for finding state action"; and that no "set of circumstances [is] absolutely sufficient"). Indeed, failure to recognize a cause of action under Title IX here might place increased and undesirable pressure on the state-action doctrine.

Second, where the retaliation constitutes state action, invalidating the agency's construction of Title IX could increase the likelihood of litigation. Title IX has been implemented through regulations that include voluntary mediation and reconciliation provisions that can help keep cases out of court. For example, the Department of Education's regulations under Titles VI and IX require the Department to make efforts "to persuade the recipient" to come into compliance and "to take such corrective action as may be appropriate." 34 C.F.R. § 100.8(d). To that end, the Department's case resolution manual calls for it to facilitate voluntary "early complaint resolution" by providing impartial conciliation, neutral advice on the applicable legal standards, and assistance in drafting voluntary agreements for the parties. Dep't of Education, *Office Of Civil Rights Case Resolution And Investigation Manual* §§ 201-203, 605(a).

If the victims of retaliation cannot assert that claim under Title IX (along with or instead of a claim under Section 1983, for example), it is doubtful that they will often invoke the voluntary alternative dispute resolution mechanisms available under Title IX. To the contrary, the natural course would be to proceed straight to court under Section 1983. In contrast, so long as a Title IX retaliation claim is available, the option of alternative dispute resolution before the agency responsible for enforcing Title IX's guarantees will continue to be an available and potentially attractive course.

Finally, sustaining the Eleventh Circuit's decision would eliminate the deterrence otherwise provided by the possibility of private lawsuits—deterrence that gives funding recipients a strong incentive to follow agency guidance and to institute procedures that keep retaliation (and thus retaliation claims) in check. For example, Title IX regulations mandate that recipients of federal financial assistance designate a Title IX coordinator, adopt and disseminate a nondiscrimination policy, and put in place grievance procedures to address complaints of discrimination on the basis of sex in educational programs and activities. 34 C.F.R. § 106.8. And the Department of Education's Sexual Harassment Guidelines explain that, when a complaint is made, a "school should take steps to prevent any further harassment and to prevent any retaliation against the student who made the complaint (or was the subject of harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses." 65 Fed. Reg. at 66,104-66,105. "In addition, because retaliation is prohibited by Title IX, schools may want to include a provision in their procedures prohibiting retaliation against any individual who files a complaint or participates in a harassment inquiry." *Id.* at 66,105-66,106.

Institutions that follow such guidance can minimize the occurrence of retaliation and the possibility of retaliation claims. Eliminating the private right of action for retaliation, however, would reduce the incentive for funding recipients to

observe those guidelines and to institute other procedures to ensure that those who identify or witness prohibited discrimination do not fear speaking the truth. Moreover, because compliance with guidelines and procedures cannot always be guaranteed, the promise of redress for any retaliation that does occur is indispensable to ensuring that those who observe discriminatory practices are not silenced by fear of irremediable retribution.

III. The Court Should Not Immunize Funding Recipients That Purport To Retaliate Universally

Consistent with Department of Justice and Department of Education regulations, manuals, and guidance, the United States rightly has urged this Court to construe Title IX to bar retaliation against those who object to conduct thought to violate Title IX. The United States' *amicus* brief at the petition stage, however, went one step further. "Because Title IX only prohibits actions taken 'on the basis of sex,'" the brief urged (at 6), "a recipient that indiscriminately retaliates against all complainers as a class would not violate the statute." A violation of Title IX occurs, the government continued, only where the funding recipient "purposefully retaliates against a complainant *because the complaint is about* intentional sex discrimination." *Ibid.* (emphasis added).

This Court need not address the hypothetical across-the-board retaliator. It is not within the question presented, which concerns whether a cause of action for retaliation exists at all, not the scope of retaliatory activities that give rise to such a cause of action. The issue was not addressed below. And respondent never has sought to defend on the ground that it retaliates against everyone who complains without regard to subject matter. This Court ordinarily will not address issues that neither fall within the question presented nor were addressed by the court of appeals below. *Yee* v. *City of Escondido*, 503 U.S. 519, 533-534 (1992); *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195

& n.2 (1989). There is good reason for the Court to follow that course here. While numerous courts have addressed retaliation claims, none to our knowledge has addressed whether across-the-board retaliation would violate Title IX. This Court traditionally functions as the court of final review, not first look. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001).

In any event, as discussed below, the government's across-the-board retaliator hypothetical is unsupported by text, logic, or experience. It contradicts the government's own position as set forth in its guidelines and manuals. It threatens the government's law enforcement interests. And it is inconsistent with the interests of sensible judicial administration.

A. Text, Logic, And Experience Demonstrate That Retaliation For Complaints About Sex Discrimination Is Discrimination On The Basis Of Sex

Notwithstanding the inherent flaws in the United States' effort to posit a hypothetical universal retaliator, the point the government seeks to make—that retaliation for complaining about sex-discrimination is itself discrimination "on the basis of sex"—is well taken. Retaliation is in every sense "on the basis of sex" when it is prompted by a complaint or testimony regarding sex discrimination. History and experience make clear that retaliation to silence and intimidate those who oppose discrimination is an integral component of discrimination itself, inseparable from it and essential to its perpetuation. See pp. 11-12, *supra*. Likewise, the ability to enforce the right against discrimination without retaliation is inseparable from and essential to the right to be free from discrimination. See pp. 10-11, *supra*.

Positing the hypothetical of the across-the-board retaliator, however, obscures the critical fact that there is simply no credible circumstance in which retaliation against individuals for having raised concerns about sex discrimination would

not constitute prohibited discrimination on the basis of sex. The United States does not suggest that funding recipients would be immune for retaliation simply because, in addition to retaliating against those who raise concerns about sex discrimination, they retaliate against a few additional categories of complainants. For example, a practice of silencing, intimidating, or retaliating against those who raise sex-discrimination claims does not cease to be discrimination "on the basis of sex" simply because the perpetrator also disfavors those who raise race-discrimination claims. Discrimination does not cease to be discrimination just because the recipient retaliates against two groups rather than one.

For similar reasons, under the government's theory, a funding recipient that disfavors a large category of complainants, together with those who complain about sex discrimination, also engages in prohibited discrimination. So long as the funding recipient excludes *any* category of complainant from retaliation, the decision to accord less favorable treatment to sex discrimination complainants is still discrimination "on the basis of sex."

Consequently, under the government's theory, retaliation in response to a complaint about sex-discrimination would not constitute discrimination "on the basis of sex" only under one theoretical circumstance: where the funding recipient adheres to a policy of *equal* retaliation against *all* who complain about *any* subject, whether it be race discrimination, gender discrimination, or the quality of cafeteria food. The suggestion that an institution would have (or claim to have) such a policy is both implausible and distracting.

Respondent certainly does not purport to have a policy of universal retaliation. And despite decades of cases addressing retaliation claims in myriad contexts, we have found no case in which a defendant has ever claimed to have such a policy. The reported decisions of the federal courts are simply bereft of instances in which a funding recipient admits

having retaliated because a complaint was filed, but defends on the ground that it was motivated by the mere fact of the complaint rather than its subject matter.[4]

B. Any Effort To Accommodate The Imaginary Universal Retaliator Would Be Administratively Unsound

Given the absence of cases raising the hypothetical, there is no reason for this Court to attempt to articulate a legal standard of retaliation to accommodate the imaginary across-the-board retaliator. To the contrary, any effort to do so would turn this Court's established standards and the lower court decisions applying those standards into an unworkable morass.

It may be possible in the abstract to draw a metaphysical distinction between retaliation that is motivated by the fact that a complaint was registered, and retaliation motivated by the fact that the registered complaint concerned sex discrimination. Implementing any such distinction in practice, however, would prove impracticable. It is difficult to imagine what sort of evidence a funding recipient might produce to prove that its motivation for retaliation was the complaint rather than its subject matter; it is harder still to imagine the proof the complainant could use to rebut that assertion; and it is nearly impossible to articulate a sensible way of instructing the factfinder how to resolve the issue of motivation.

The difficulty of reconciling the United States' posited hypothetical with an administrable standard becomes more acute in light of the well-established system of *prima facie* proof and shifting burdens under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) (developing the framework

[4] Even if a funding recipient claimed to have a policy of across-the-board retaliation, the motivation for such a policy would nonetheless be an issue of fact. It seems plausible, if not likely, that a facially neutral policy of retaliating against all complainants would be motivated by (but seek to mask) hostility toward certain categories of complaints.

under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S. C. § 2000e-2(a)(1)).[5] Under *McDonnell Douglas*, the plaintiff first must make a *prima facie* showing of discrimination. 411 U.S. at 802; *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 251, 252-253 (1981). At that point, the defendant has the burden of coming forward with a legitimate, non-discriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254; *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 509 (1993). If the defendant meets that burden of production, the plaintiff must show by a preponderance of evidence that the putative reason offered by the defendant was a pretext for discrimination. *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Burdine*, 450 U.S. at 253.

In general, a plaintiff seeking to establish a *prima facie* case where retaliation is alleged must produce some evidence to support a causal link between her complaint or participation in discrimination proceedings and the adverse action. *McDonnell Douglas*, 411 U.S. at 802; *Reeves*, 530 U.S. at 142; see, *e.g.*, *Raggs* v. *Mississippi Power & Light Co.*, 278 F.3d 463, 471 (5th Cir. 2002). By design, the burden "is not onerous." *Burdine*, 450 U.S. at 253. But if the individual claiming retaliation is saddled with the additional burden of showing that the *subject* of the complaint motivated the retaliation, the burden likely would be insurmountable. Rarely would evidence available to the plaintiff differentiate between whether the funding recipient was motivated by the

[5] Federal courts routinely have used the *McDonnell Douglas* burden-shifting framework not only under Title VII but also under other anti-discrimination statutes, including Title IX. See, *e.g.*, *Yusuf* v. *Vassar College*, 35 F.3d 709 (2d Cir. 1994); *Preston* v. *Commonwealth of Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203 (4th Cir. 1994); *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); *Lipsett* v. *University of Puerto Rico*, 864 F.2d 881, 897 (1st Cir. 1988); *O'Connor* v. *Peru State Coll.*, 781 F.2d 632 (8th Cir. 1986).

complaint or by its subject matter. There is no reason for the Court to encumber the victims of retaliation with that potentially insuperable burden.

C. The Government's Hypothetical Exclusion For Across-The-Board Retaliation Is Contrary To Its Own Guidance And Law Enforcement Interests

The government's proposed exclusion for the hypothetical universal retaliator is also contrary to its own written guidance. The Department of Education's Sexual Harassment Guidelines, for example, prohibit retaliation for filing complaints across the board, without regard to how the funding recipient treats other complainants. According to the Guidelines, funding recipients "should take steps to * * * prevent *any* retaliation against the student who made the complaint (or was the subject of harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses," and should advise complaining students "that Title IX prohibits retaliation." 65 Fed. Reg. at 66,104-66,105 (emphasis added). The Guidelines nowhere suggest that Title IX permits—or that complainants should be told that Title IX permits—retaliation for the filing of a complaint so long as the retaliation is motivated by the *complaint* but not its *subject*.

Likewise, the Department of Justice's *Title IX Manual* makes no exception for retaliation based on the filing of a complaint if the complaint itself, rather than its subject, motivates the retaliatory response. Instead, the Manual states that a "recipient's retaliation against a person who has filed a complaint or who assists enforcement agencies in discharging their investigative duties violates Title IX." *Title IX Manual* at 70. That bright-line rule makes good sense from a law enforcement perspective. Because retaliation intimidates victims and witnesses alike—it prevents them from offering the evidence and information necessary to effective law

enforcement—the prohibition on retaliation is necessary to protect "the integrity and effectiveness of the enforcement process itself." *Id.* at 71. Retaliation poses no lesser threat to the efficacy of law enforcement when it targets those who raise concerns about sex discrimination together with numerous others than when it targets only those who complain of sex discrimination.

Perhaps for that reason, the United States (notwithstanding its reliance on the hypothetical equal-opportunity retaliator) nowhere suggests that the Court should adopt a standard of liability to accommodate across-the-board retaliation. Nor is any such exception statutorily mandated. Administrative agencies and courts must, by necessity, use rules and standards that generalize. No principle of statutory construction requires them to accommodate a hypothetical case that is, to put it mildly, unlikely to arise. See *Barnhart* v. *Thomas*, 124 S. Ct. 376, 382 (2003). That is particularly true where, as here, the hypothetical scenario has never arisen; its accommodation would throw a jurisprudential monkey-wrench into the otherwise well-established machinery used to adjudicate discrimination claims; might invite funding recipients to obfuscate discriminatory conduct; and would impede and potentially prevent enforcement of the statutory right.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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OFFICE FOR CIVIL RIGHTS
SOUTHERN DIVISION

DISTRICT OF COLUMBIA OFFICE
District of Columbia, Virginia, North Carolina, South Carolina

July 1, 2004

Ms. Nichole Birch
O'Melveny and Myers, LLP
1625 Eye Street, NW
Room 9C
Washington, DC 20006

Dear Ms. Birch:

I am writing in response to your June 29, 2004 Freedom of Information Act (FOIA) request for all statistical data pertaining to the number of complaints nationally alleging retaliation under Title IX, Title VI, and Section 504 for the past ten years. FOIA only requires the production of existing documents; it does not require a Federal agency to compile a document or other information. As the information you requested is not already contained in an existing document, we are not required to provide it under FOIA. However, I have decided to provide you with the information anyway.

The following represents the number of complaints received between June 1, 1994 and June 29, 2004 that include the allegation of retaliation:

Number of Complaints Alleging Retaliation Received between June 1, 1994 and June 29, 2004

Jurisdiction	*Total Received*
Title IX	**842**
Title VI	**1,387**
Section 504/Title II	**2,458**

The numbers above reflect data in OCR's Case Management System database in which "retaliation" is reported as a jurisdictional basis and/or issue. These complaints may

include other issues, in addition to retaliation; there is no ready way to isolate complaints alleging "only" retaliation.

I hope this information meets your needs. If we can be of further assistance, please contact me at (202) 208-2545.

Sincerely,

Alice B. Wender
Director
District of Columbia Office

Supreme Court, U.S.
FILED
OCT 7 - 2004
OFFICE OF THE CLERK

No. 02-1672

In the
Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether this Court can imply a private right of action for retaliation under Title IX.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Respondent.[1] Petitioner and Respondent consented to the filing of amicus briefs in support of either party on July 19 and July 27, 2004, respectively.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, Pacific Legal Foundation provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Pacific Legal Foundation litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. Pacific Legal Foundation is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

Attorneys for Pacific Legal Foundation have previously litigated questions regarding the scope and meaning of federal civil rights legislation. For example, Pacific Legal Foundation attorneys represented the California State Board of Education in a case that alleged California's Proposition 227, an initiative replacing bilingual education with English immersion, violated federal regulations promulgated pursuant to Section 602 of Title VI of the Civil Rights Act of 1964. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998). PLF also participated as amicus before this Court in *Alexander v. Sandoval*, 532 U.S.

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

275 (2001), a case involving the question of whether Congress intended to create a private right of action for "disparate impact" discrimination under Title VI.

Pacific Legal Foundation has a long history of advocacy before this Court in cases involving the interpretation of other federal laws as well. For example, Pacific Legal Foundation was *amicus curiae* in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Pacific Legal Foundation believes its public policy perspective and litigation experience will provide an additional viewpoint on the legal issues presented by this case.

SUMMARY OF ARGUMENT

The issue before this Court is whether Petitioner has a right of action for retaliation under Title IX, which prohibits state and local governments from sex discrimination in the operation of federally funded education. The constitutional principles of federalism and separation of powers, along with fairness and predictability in the law, strongly militate against this Court's implying a right of action for retaliation under Title IX.

Congress passed Title IX pursuant to its broad Spending Clause powers. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999). Title IX permits Congress to attach unambiguous conditions on state and local governments that accept federal funds for education. 20 U.S.C. §§ 1681-1682. Conditioning federal funding is Congress's way of indirectly regulating the conduct of recipient state and local governments in areas normally reserved to them, and those conditions are constitutional only if they are unambiguous and the recipients

knowingly consent to them. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Unless based on such unambiguous and consented-to conditions, the regulation of purely state or local government activity, like education, is outside the scope of Congress's enumerated powers and violates the Tenth Amendment's decree that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X; *id.* art. I, § 8 (enumerating Congress's powers); *Dole*, 483 U.S. at 206-07.

When before a court, the question of what conditions the Congress and a recipient state or local government like Respondent have agreed to pursuant to Title IX implicates two fundamental constitutional principles: (1) the federalist principle of dual sovereignty, as reflected in the Constitution's enumeration of congressional powers, and in the Tenth Amendment, and (2) the separation of powers reflected in the Constitution's division of authority between the executive, legislative, and judicial branches of the federal government. U.S. Const. art. I, § 8 (enumerating congressional powers); *id.* amend. X; *id.* arts. I-III (dividing powers of federal government among the three branches).

Guided by these principles, the Court should conclude that it may not imply a right of action for retaliation under Title IX.

By implying a right of action for retaliation under Title IX, the Court would add a condition that Respondent could not have reasonably anticipated: exposure to liability for retaliation under Title IX. If the Court concludes (as it should) that neither the text, structure, nor history of Title IX supports such a right of action, then implying a right of action for retaliation anyway would expand the Congress's scope of authority over Respondent outside its enumerated powers. Inclusion into Title IX of a new condition would constitute nothing less than a

rewriting of that statute on behalf of Congress which, as revised, would violate the Tenth Amendment.

By the same token, a decision of this Court that implies a right of action for retaliation under Title IX where no evidence of one exists invades the exclusive province of the Congress. Only Congress can provide rights of action for violations of its federal laws, and the Court should not accept Petitioner's invitation to step into Congress's shoes and legislate for it in such a way. To do so would violate the separation-of-powers doctrine embodied in the first three articles of the Constitution. U.S. Const. arts. I-III (dividing powers between the legislative, executive, and judicial branches, respectively).

Moreover, the traditional presumption against retroactive legislation counsels against implying a right of action for retaliation under Title IX, which would expose Respondent to liability it could not have reasonably anticipated when it originally accepted federal funding. Further, such a decision would burden state and local governments who must try to evaluate the costs and benefits of participating in a federal funding program: How will they know what the nonexpress terms and conditions of federal funding are? Many could simply forgo federal funding in light of the undefined exposure to liability under Title IX and similar Spending Clause statutes, with the losers being the school children who would have benefitted from that funding. A decision that rejects an implied right of action for retaliation under Title IX, and defers to the Congress to add it if it so chooses, avoids these issues of fairness and predictability in the law.

For these reasons, the decision below should be affirmed.

ARGUMENT

I

THE PRINCIPLE OF FEDERALISM WEIGHS AGAINST JUDICIAL RECOGNITION OF AN IMPLIED RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX

The United States Constitution establishes a system of "dual sovereignty" based on the principle of federalism. By approving the Constitution, the people—in whom the power resided in the first instance—delegated some of its power to the federal government, delegated some of its power to the individual state governments, and reserved to itself all residual power. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."); *id.* amend. X (referring to powers "not delegated," "prohibited," and "reserved" by the people); The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) ("[The federal government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); Roger Pilon, *On the First Principles of Federalism*, Cato Policy Report, November/December 1995, *available at* http://www.cato.org/pubs/policy_report/pr-nd-rp.html (making the case that all power initially resided in the people, who delegated some of it to the federal government and some of it to the states under the Constitution).

The Framers made dual sovereignty implicit in the Constitution with its conferral on Congress of specific, enumerated powers. U.S. Const. art. I, § 8. James Madison explained that a dual system of government would protect against federal usurpations of power. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). Dual sovereignty was made explicit when the Tenth Amendment, which James Madison drafted, was added to the Constitution as

part of the Bill of Rights. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Thomas Jefferson considered the Tenth Amendment "the foundation of the Constitution." Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), in THE PORTABLE THOMAS JEFFERSON 261, 262 (Merrill D. Peterson ed., 1975).

Congress may legislate in harmony with the Tenth Amendment only pursuant to its enumerated powers, one of which is the Spending Clause power. U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties. Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."). Under its Spending Clause power, Congress may attach conditions on state and local governments' receipt of federal funds in order to enforce broad policy objectives that it could not otherwise directly enforce through the other enumerated powers. *Dole*, 483 U.S. at 206-207. As the Court in *Dole* said:

> [T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. Thus, objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

Id. at 207 (internal citations and question marks omitted).

But Congress's spending power is constitutionally limited, and it cannot use it to circumvent the Tenth Amendment:

> The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of the general welfare . . . . Second, we have required that if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation. Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs . . . . Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

Id. at 207-08 (internal citations and quotations marks omitted).

Of particular relevance in this case is the requirement that conditions on federal funding be unambiguous and knowingly agreed to. *Id.*; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). Like the others, this requirement protects the Constitution's careful balance of powers between the federal government and the recipient state or local government by ensuring that the recipient does not involuntarily cede any authority. To that end, a conditional federal funding arrangement operates much like a strictly interpreted contract, and "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17 ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."). As one legal scholar put it:

> [The Court has demonstrated] a cautious approach to the construction of statutes that allegedly impose conditions on federal spending for the states. In acknowledging the potentially abrasive effect of such conditions, the Court has suggested that the arrangement be regarded as much in the nature of a contract: in return for federal funds, the States agree to comply with federally-imposed conditions. The Court has stated that, as a matter of interpretation, such a contract will not be found unless Congress has spoken unambiguously.

Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103, 1141-42 (1987) (citations and internal quotation marks omitted).

Title IX is a Spending Clause statute that Congress enacted to fund and regulate the conduct of recipient state and local governments in education. 20 U.S.C. § 1681; *Davis*, 526 U.S. at 640. Title IX "amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). As the primary condition of federal funding, Title IX prohibits recipients from discriminating on the basis of sex in the operation of education programs or other activities. 20 U.S.C. § 1681(a).

Recipients are fully "cognizant of the consequences of their participation" if they violate the condition prohibiting sex discrimination: They may either lose the funds or face a private right of action in federal court by the victim of the alleged sex discrimination. 20 U.S.C. § 1682 (termination of funds); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (recognizing sex discrimination victim's right to sue under Title IX). The condition prohibiting sex discrimination on pain of losing funds or being sued under Tile IX was clear to Respondent when it accepted federal funds. Thus, recognizing

the condition, and all of the consequences flowing from its violation, do not implicate the Tenth Amendment.

Another condition, regarding retaliation, appears in the federal regulations:

> No recipient [of federal funds] or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [20 U.S.C. § 1681] or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e); *id.* § 106.71 (section 100.7(e) was originally promulgated by the Department of Justice to enforce Title VI, but in section 106.71 the Department of Education incorporated by reference section 100.7(e) and other regulations enforcing Title VI to enforce Title IX).

Petitioner's claim boils down to this: By accepting federal funding, Respondent knowingly consented to the condition set forth in that federal regulation that it would assume the risk of liability under Title IX for alleged retaliation against a person claiming noncompliance with Title IX. If Respondent were not the recipient of Title IX funds, Petitioner would be unable to bring *any* kind of Title IX claim against Respondent, much less a Title IX claim for retaliation. *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970) (state has "alternative choices" of complying with federal requirements or declining federal funds); *see also James v. Jones*, 148 F.R.D. 196, 200 (W.D. Ky. 1993) (" '[F]ederally imposed conditions' have no force, and potential beneficiaries have no cause of action, if a State refuses the federal funding to which those conditions are attached."). Thus, it is only on the basis of Respondent's acceptance of some condition in exchange for federal funds that Petitioner can make even a colorable argument that a right of action for retaliation exists under Title IX. The question is whether

Respondent agreed to the added exposure of liability for retaliation under Title IX as a condition of the federal funds.

Congress allows federal agencies to terminate federal funding for the violation of the nonretaliation regulation (and other regulations), but only after they satisfy certain procedural requirements, including giving the offending recipient notice and an opportunity to comply, providing it with a hearing, and reporting to Congress. 20 U.S.C. § 1682. This Court recently held that Congress's similarly elaborate scheme for enforcing *Title VI* regulations (after which Title IX was modeled) excluded the possibility that Congress intended to also create a private right of action as an alternative means of enforcement. *Sandoval*, 532 U.S. at 290-91 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. . . . [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." (citations and internal quotation marks amounted).

The Court is urged to adopt the same holding here, with the principle of federalism in mind: Respondent was "cognizant of the consequences of [its] participation" in the Title IX program if charged with retaliation: It could be subjected to—*at most*—the loss of federal funding. By contrast, Respondent was not cognizant of the fact that it might be subjected to a Title IX lawsuit for alleged retaliation. If the Court were to recognize a right of action for retaliation under Title IX anyway, the Court would in effect alter the contract between the Congress and Respondent by imposing a condition that did not "unambiguously" exist in Title IX at the time Respondent accepted federal funding. And it would be doing so on behalf of the Congress, which expressed no intent to create a right of action for retaliation under Title IX.

The Tenth Amendment limits Congress's exercise of powers to those enumerated in Article I, section 8, reserving all other powers to the States or to the people. U.S. Const. amend. X. Absent an agreement by Respondent to submit to Title IX claims for retaliation at the time it accepted federal funds, the Court cannot imply a right of action for retaliation under Title IX. If it were to do so, it would expand the scope of Congress's power at the expense of Respondent and other state and local government recipients, in contravention of the Tenth Amendment.

II

THE SEPARATION-OF-POWERS DOCTRINE WEIGHS AGAINST JUDICIAL RECOGNITION OF AN IMPLIED RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX

With the federalist principle of dual sovereignty, the separation-of-powers doctrine is at the heart of our constitutional form of government. Enshrined in the first three articles of the Constitution, the separation-of-powers doctrine ensures that each of the three branches of government will jealously guard against usurpations of authority by the other two and, in so doing, prevent the concentration of power. U.S. Const. arts. I-III; The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). As this Court so aptly warned:

> The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to

> exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

I.N.S. v. Chadha, 462 U.S. 919, 951 (1983).

Congress has the exclusive authority to create private rights of action to remedy violations of federal laws. U.S. Const. art. I, § 8 (granting Congress the authority to pass laws); *id.* art. III (granting Congress the authority to define the judicial power of the lower federal courts); *Sandoval*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 Bankr. Dev. J. 77, 206 n.23 (2003) ("One area in which the Court's recent separation of powers jurisprudence has been evident is in the area of implied rights of action.").

Over the last forty years, the Court has been increasingly reluctant to imply private rights of action for statutory violations. Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 781-83 (5th ed. 2003). Since the Court's 1975 decision in *Cort v. Ash*, 422 U.S. 66, 78 (1975), in which it articulated a stringent four-factor test for finding an implied right of action, the Court "has generally rejected claims of implied federal remedies." Fallon, *supra*, at 781; *see also* Wasson, *supra*, at 206 n.23 ("Beginning with *Cort v. Ash*, the Court has taken an increasingly hostile stance against finding implied rights of action.").

This reluctance is in no small part attributable to the Court's concern for preserving the separation of powers between the legislative and judiciary branches. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) ("The test [employed to determine whether an implied right of action

exists for a violation of statutory law] reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes."). In *Sandoval*, this Court stated:

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy . . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute . . . . Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.

Sandoval, 532 U.S. at 286-87.

Like dual sovereignty, the separation-of-powers doctrine informs this Court's analysis of whether it should imply a right of action for retaliation under Title IX.

Title IX does not confer a right of action for retaliation on individuals, much less those who have not even been directly discriminated against on the basis of sex. Yet Petitioner invites this Court to step into Congress's shoes and create such a right of action in the statute anyway. Were the Court to accept that invitation, it would be violating the separation of powers by legislating on Congress's behalf based on a hunch about what Congress may have intended. The Court should heed its own warning in *Sandoval* and avoid overstepping its constitutionally defined authority by creating new causes of action where Congress has expressed no intent to do so.

III

PUBLIC POLICY MILITATES AGAINST FINDING A PRIVATE RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX

Besides implicating federalism and separation-of-powers concerns, recognizing a private right of action for retaliation under Title IX poses public policy problems.

First, finding a private right of action for retaliation under Title IX where that statute does not expressly provide for it would undermine fundamental notions of justice, particularly fairness and predictability. If Petitioner were to prevail, Respondent would be retroactively bound to a condition it could not have reasonably anticipated when it agreed to federal funding. Because the creation of a right of action for violation of a federal statute is a purely legislative act, the Court would be retroactively legislating by implying that one exists under Title IX. *Sandoval*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). Not only would this undermine the separation-of-powers doctrine as described in the previous Part, but it would also run counter to the presumption against retroactive legislation so deeply rooted in American jurisprudence:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted . . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994) (holding that legislation creating new right to recover

compensatory and punitive damages for violations of Title VII, enacted while case was pending on appeal, did not apply to that case).

Further, if the Court were to establish the precedent of recognizing a right of action in a statute where none expressly exists, it would force state and local governments considering participation in federal funding programs to engage in costly and time-consuming guesswork about what conditions and consequences would bind them. Their exposure for liability under Title IX (and other statutes like it) would be undefined and subject to judicial expansion. In the face of such uncertainty, some state and local governments would undoubtedly forgo participation in federal programs like Title IX, to the detriment of schools and the children they serve. For this reason, this Court has characterized Title IX arrangements as contracts that deserve the same predictability and stability as other contracts:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S. at 17 (internal citations omitted); *see also Landgraf*, 511 U.S. at 271 ("The largest category of cases in

which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.").

Second, if the task of the Court is to discern the intent of Congress, then it has nothing to lose, and everything to gain, from refusing to recognize an implied right of action for retaliation under Title IX. Recognizing a right of action in a statute that does not expressly provide for it would risk compromising the principles of federalism and separation-of-powers, along with fundamental notions of justice, as discussed at length in this brief.

On the other hand, if the Court were to imply such a right of action for retaliation, the Court would avoid these constitutional and equitable problems. If the Court turns out to be mistaken, and the Congress *did* intend to provide for a right of action for retaliation under Title IX, Congress can easily correct that mistake through legislation that makes its intention express. This more cautious approach promotes democratic accountability by ensuring that the Congress, as representatives of the people and the lawmakers, are held to account for those legislative decisions—like the scope of liability to which it exposes local and state government participants in federal programs. *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., dissenting) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it.").

CONCLUSION

The constitutional principles of federalism and separation of powers militate against the Court's implying a right of action for retaliation under Title IX. A contrary ruling risks disturbing the balance of powers between the federal government and the state and local governments, as well as between the legislative and judiciary branches of the federal government. Moreover, considerations of fairness and predictability strongly weigh against such judicial activism and in favor of permitting the Congress, if it so chooses, to make its legislative intent express.

DATED: October, 2004.

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RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICI CURIAE BRIEF OF WOMEN'S SPORTS FOUNDATION, MYRA SADKER ADVOCATES, ET AL. IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, encompasses redress for retaliation for complaints about unlawful sex discrimination.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Women's Sports Foundation (WSF) is a non-profit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and to creating an educated public that supports gender equity in sports. The WSF distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries per year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of girls and women in sports.

Myra Sadker Advocates (MSA) is a non-profit organization dedicated to promoting equity in and beyond schools. Myra Sadker, educator, author, and Dean at American University, exposed both the subtle and blatant educational biases that limit the academic, psychological, economic and physical potential of both males and females. MSA supports research, training and special programs to assist teachers, parents, children and other adults in eliminating such biases from America's schools.

The National Association for Girls and Women in Sport (NAGWS) began in 1899 and continues today as an association of 4,000 teachers, coaches, professors and administrators dedicated to equality in sport for girls and women. The mission of NAGWS is to develop and deliver equitable and quality opportunities for all girls and women through relevant research, advocacy, leadership development,

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1. No counsel for any party authored this brief either in whole or in part, and no persons other than the amici curiae and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

educational strategies, and programming in a manner that promotes social justice and change.

The National Association of Collegiate Women Athletics Administrators (NACWAA) is a not-for-profit, 501(c)(3) membership organization, dedicated to providing educational programs, professional and personal development opportunities, information exchange, and support services to enhance college athletics and to promote the growth, leadership and success of women as athletics administrators, professional staff, coaches and student-athletes. NACWAA supports all initiatives to protect those suffering from retaliation for bringing gender equity complaints to Title IX enforcement officials.

Founded in 1985, the National Consortium for Academics and Sports (NCAS) is an ever-growing organization representing 218 colleges and universities which provide opportunities for current and former student-athletes to continue their pursuit of higher education, while working in the community addressing social issues. The mission of the NCAS is to create a better society by focusing on educational attainment and using the power and appeal of sport to positively affect social change.

Created in 1984, Northeastern University's Center for the Study of Sport in Society (CSSS) is committed to the use of sports as a powerful tool for positive social change. The mission of the CSSS is to increase awareness of sport and its relation to society, and to develop programs that identify problems, offer solutions and promote the benefits of sport. The CSSS supports all those in need of protection from retaliation for submitting grievances to Title IX officials.

Dads and Daughters is a 501(c)(3) national advocacy non-profit for fathers and daughters. Dads and Daughters

inspires fathers to actively and deeply engage in the lives of their daughters and galvanizes fathers and others to transform the pervasive cultural messages that devalue girls and women. On behalf of its membership, Dads and Daughters clearly states that fathers want their daughters' coaches and advocates to stand up for their civil rights. Dads and Daughters believes that it is absolutely essential for coaches and advocates to be protected from retaliation of any kind when they act on behalf of our children's rights and well-being.

SUMMARY OF ARGUMENT

A private right of action for retaliation under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 - § 1688, is necessary to effectuate fully the purposes of the statute, which are to remedy and prevent gender discrimination in all aspects of education, including sports. Opportunities to participate in sports are educational gateways to economic and professional opportunities in contemporary American society. Girls and women, in particular, derive substantial physical, psychological and cultural benefits from sports participation that continue through adulthood and into old age. This case is ultimately about implementing the purpose behind Title IX, to achieve Congress's intent to ensure that girls and women are treated equitably and are given the opportunity to fully realize the benefits that athletics offers.

The nation has witnessed a revolution in sports participation for women. *See Cohen v. Brown Univ.*, 101 F.3d 155, 188 (1st Cir. 1996) ("Title IX has changed the face of women's sports as well as our society's interest in and attitude toward women athletes and women's sports."), *cert denied*, 520 U.S. 1186 (1997). Enormous increases in sports participation have led to riveting Olympic victories, the ability to watch the United States win the Women's World

Cup before a packed house at the Rose Bowl, and new professional opportunities such as the Women's National Basketball Association. As the Ninth Circuit recently noted, the "victorious athletes understood as well as anyone the connection between a 27-year-old statute and tangible progress in women's athletics." *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 773 (9th Cir. 1999). Although the implementation of Title IX has led to impressive gains in opportunities for girls and women, the playing field is still far from level. Women's athletic programs continue to lag behind men's programs by every measurable criterion, including participation opportunities, athletic scholarships, operating budgets and recruiting expenditures.[2] Much remains to be done.

If Title IX's goal of gender-equity in athletics is to be fully achieved, those who complain about discrimination – and particularly coaches who are the gatekeepers of opportunities and the advocates for girls and women in sports – must be protected from retaliation for actions taken in furtherance of this goal. Coaches are uniquely positioned to prevent and informally remedy the discrimination and inequities that arise within the educational institutions in which they coach. Yet coaches face fragile employment realities that render them particularly vulnerable to retaliatory actions. Without protection from retaliation, coaches – who should be the strength and voice for their student-athletes – are rendered speechless, and thus ineffectual, in the enforcement of Title IX.

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2. For example, while women in National Collegiate Athletic Association (NCAA) Division I member institutions represent 54.5 percent of the student bodies, they represent less than 44 percent of athletes, 34 percent of the operating budgets, 33 percent of the recruiting budgets, and just 44 percent of the athletic scholarships. *See* 2001-02 NCAA Gender-Equity Report at 11, 23, 24 (2002), *available at* http://www.ncaa.org/library/research/gender_equity_ study/2001-02/2001-02GenderEquityReport.pdf#gender_equity. Every year male athletes receive $208 million more than female athletes in college athletic scholarships at NCAA member institutions. *See id.* at 23, 30.

Consistent with this Court's recognition of the need for a broad interpretation of anti-discrimination laws, Title IX should be interpreted to prevent educational institutions that receive federal funds from engaging in retaliation against coaches and others who act in furtherance of Title IX's laudable purpose. Administrative enforcement under the Department of Education, through its Office for Civil Rights (OCR), has been an inadequate measure for effectively ensuring compliance with Title IX in athletics. Because administrative enforcement fails to rectify existing discriminatory behavior, and because most students are ill-equipped to carry the burden of enforcing the law themselves, private enforcement by way of actions for retaliatory discharge is essential to effectuate the statutory goal of eliminating gender discrimination in athletics.

ARGUMENT

A PRIVATE CAUSE OF ACTION FOR RETALIATION IS CRITICAL TO ACHIEVE TITLE IX'S PURPOSE OF ELIMINATING GENDER DISCRIMINATION IN EDUCATION.

Title IX is the essential means of leveling the playing field for our nation's youth. Gender equity has not yet been achieved, and indeed cannot fully be achieved, absent one of the most potent and efficient arrows in the Title IX quiver: a claim for retaliation. To be effective, this claim must apply to persons in key positions, such as coaches, who are uniquely positioned to speak for their athletes and who are uniquely vulnerable without the shield that a retaliation claim provides.

Coach Jackson brought a federal lawsuit to challenge his school's retaliation against him for protesting, as violative of Title IX, the unequal funding and access to athletic equipment and facilities of the girls' basketball team.

In dismissing his claim, the Eleventh Circuit relied on this Court's holding in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that individuals may not assert claims under Title VI for disparate impact discrimination. The Eleventh Circuit held that because retaliation is only explicitly mentioned in the Title IX regulations and is not mentioned in the statute itself, Coach Jackson had no right to sue to challenge the retaliatory actions taken against him. *See Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1344-46 (11th Cir. 2002). The Eleventh Circuit thus held that Title IX does not permit a retaliation claim by those who protest gender discrimination, no matter how purposeful the retaliation, and no matter how much it chills efforts to ensure the purposes of Title IX are fulfilled, simply because retaliation is not specifically mentioned in the language of the statute. In so ruling, the Eleventh Circuit ignored Title IX's broad prohibition against gender discrimination, Congress's purpose in enacting the statute, and the long history of including claims for retaliation in anti-discrimination laws.

I. The Sports Experience Provides Girls and Women With Significant Benefits.

Athletics play a vital role in society, especially for women. In 1973, 50 million viewers watched Billie Jean King defeat Bobby Riggs in the "Challenge of the Sexes," a victory that directly confronted previously entrenched gender stereotypes. The performances of female athletes such as Joan Benoit, Mary Lou Retton, Jackie Joyner-Kersee, Janet Evans, Bonnie Blair, Lisa Leslie and Mia Hamm continue to inspire and encourage our nation's girls to break down the barriers that limit their potential. Women athletes are heroes and mentors, leaders and role models. Each female athlete is a living affirmation of why it is important to ensure equal opportunity in sports.

This Court has recognized that education plays "a fundamental role in maintaining the fabric of our society," *Plyler v. Doe*, 457 U.S. 202, 221 (1982),[3] and athletics play a vital part in that role. Sports participation teaches young people critical lessons, including how to set goals and work to achieve them, how to win and lose gracefully, how to postpone short term gratification for long term rewards, how to perform under pressure, how to function as part of a team, and how to take criticism. Student-athletes develop self-confidence, perseverance, and a desire to succeed. Contrary to the "dumb jock" myth, interscholastic sports participation provides both boys and girls from diverse socioeconomic, racial, and ethnic backgrounds measurable positive educational impacts, including improvements in self-concept, higher educational aspirations in the senior year, improved school attendance, increased math and science enrollment, more time spent on homework, and higher enrollment in honors courses. *See* H.W. Marsh, *The Effects of Participation in Sport During the Last Two Years of High School*, 10 Soc. Sport J. 18 (1993).

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3. *See also Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (this Court recognized the import of gender equity stating, "because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our *educational institutions*, in the job market and, perhaps most conspicuously, in the political arena") (emphasis added). The special status of educational institutions recently led this Court to embrace the pursuit of diversity as a compelling interest, and to acknowledge that diverse classrooms allow enlightened and vigorous class discussions, extinguish stereotypes, and lead to cross-cultural understanding. *See Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003).

A. Sports Participation Improves Girls' Educational Achievement.

The educational benefits girls, in particular, derive from sports participation are stunning. For example, female student-athletes have higher grades and higher graduation rates than their non-athletic peers. NCAA graduation rates for women remain high – 68% compared to 58% for the Division I female student body. *See 2001 NCAA Graduation Rates Report*, *available at* http://www.ncaa.org/grad_rates/2001/index.html. In high school, both white and black female student-athletes graduated at rates higher than their student-body counterparts. *See* Nat'l Fed'n of State High School Ass'ns, *The Case for High School Activities* (2004), *available at* http://www.nfhs.org/scriptcontent/Va_custom/va_cm/contentpagedisplay.cfm?content_ID=71&SearchWord=case%20high%20school%20activities (A state-wide, three-year study by the North Carolina High School Athletic Association found that athletes had higher grade point averages (by almost a full grade point), lower dropout rates, and higher high school graduation rates, than their non-athletic peers); *see also* Richard E. Lapchick, *Keeping Score When it Counts: Graduation Rates and Diversity in Campus Leadership for the 2004 Women's Sweet 16 Teams*, University of Central Florida's Institute for Diversity and Ethics in Sports (March 2004) (study showing that female athletes in the national basketball tournament had exceedingly high graduation rates).

These educational benefits appear to translate into business success. A recent study by the Oppenheimer Fund found that more than four out of five executive businesswomen (81%) played sports growing up – and the vast majority reported that the lessons they learned on the playing field have contributed to their success in business. *New Nationwide Research Finds: Successful Women Business Executives Don't Just Talk a Good Game . . . They Played One* (2002), *available at* http://www.massmutual.com/mmfg/pdf/boardroom.pdf. The business of sports, including athletic administration, coaching, sports management, sports medicine, marketing and manufacturing, is a nearly $200 billion per year industry. 4 Sports Bus. J. 47 (March 2002), *available at* http://www.sportsbusinessjournal.com/images/random/SportsIndustry.pdf. A common gateway into a career in the sports industry is having significant sports experience on one's resume.

B. Sports Participation Improves Girls' Health.

Girls and young women today face a daunting array of increasing physical health risks, such as obesity, heart disease, breast cancer, osteoporosis, tobacco and drug use, unwanted teen pregnancy, sexually transmitted diseases, depression and suicide. These health risks account for much of the more than $1 trillion spent on healthcare for treating these issues. *See generally* Don Sabo et al., *The Women's Sports Foundation Report: Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls* (2004), *available at* http://www.womenssportsfoundation. org/binary-data/WSF_Article/pdf_file/990.pdf ("*Her Life Depends On It*") (a comprehensive survey of scientific research on girls' health, sports participation, and physical activity). As one example, in 1970, only one out of every twenty-one girls was obese or overweight; today, even though more girls are playing sports, that figure is an alarming one in six. *See* Fed. Interagency Forum on Child & Family Statistics, *America's Children in Brief: Key National Indicators of Well-Being* (2004), *available at* http://childstats.gov/americaschildren/pdf/ac04brief.pdf. The available research demonstrates that more physical activity and sports participation are fundamental solutions for many of these serious health and social problems faced by our nation's young girls. *See Her Life Depends On It*, *supra*, at 38.

For example, research demonstrates that women who participated in regular physical exercise during their reproductive years have up to a 60% reduced risk of breast cancer. *See* Leslie Bernstein, et al., *Physical Exercise and Reduced Risk of Breast Cancer in Young Women*, 86 J. Nat'l Cancer Inst. 1403 (1994) (reporting that one to three hours of exercise per week over a woman's reproductive lifetime may bring a 20-30% reduction in the risk of breast cancer, and four or more hours of exercise per week may reduce the same risk by almost 60%). Osteoporosis afflicts 10 million Americans, 80% of whom are women. *See* Nat'l Osteoporosis Found., *Fast Facts* (2003), *available at* www.nof.org/osteoporosis/diseasefacts.htm. Physical activity and sports participation in the school-age years have been shown to increase bone density. D. Teegarden, et al., *Previous Physical Activity Relates To Bone Mineral Measures In Young Women*, 28 Med. & Sci. in Sports & Exercise 105 (Jan. 1996). Alzheimer's disease mainly affects the oldest people in the United States, who are disproportionately women. D.A. Evans et al., *Prevalence Of Alzheimer's Disease In A Community Population Higher Than Previously Reported*, 262 J. Am. Med. Ass'n, 2251 (1989). Higher levels of physical activity earlier in life may reduce the risk for Alzheimer's later in life. *See* Sandra K. Pope, et al., *Will a Healthy Lifestyle Help Prevent Alzheimer's Disease?*, 24 Annual Review of Public Health, 111 (2003). These results suggest that implementation of regular physical exercise programs as a critical component of a healthy lifestyle should be a high priority for adolescent and adult women.

Female athletes are also less likely to smoke or use illicit drugs. *See, e.g.*, M.J. Melnick et al., *Tobacco Use Among High School Athletes And Nonathletes: Results Of The 1997 Youth Risk Behavior Survey*, 36 Adolescence 727 (2001); *see also* Wyoming High School Activities Ass'n, *Student Activities Survey* (1998) (finding that only 25% of high school

athletes, compared to 40% of non-athletic high school students, smoke cigarettes); K.E. Miller et al., *The Women's Sports Foundation Report: Health Risks and the Teen Athlete*, 1, 8 (2000) *available at* http://www.womenssportsfoundation.org/binary-data/WSF_Article/pdf_file/771.pdf. (national study finding that female athletes, especially white female athletes, involved in school or community sports were significantly less likely to use marijuana, cocaine or most other illicit drugs); R.R. Pate et al., *Sports Participation and Health-Related Behaviors Among U.S. Youth*, 154 Archives of Pediatric & Adolescent Med. 904 (2000) (same); *The Case for High School Activities, supra* (concluding that 92% of high school athletes do not use drugs). Additionally, female athletes are less likely to become pregnant as teenagers than their non-athlete counterparts. *See* T. Dodge and J. Jaccard, *Participation in Athletics and Female Sexual Risk Behavior: The Evaluation of Four Causal Structures*, 17 Journal of Adolescent Research 42 (2002); The President's Council on Physical Fitness and Sports Report, *Physical Activity & Sports in the Lives of Girls*, (Spring 1997), *available at* http://education.umn.edu/tuckercenter/pcpfs/default.html (citing to studies suggesting that higher rates of athletic participation among adolescent girls were significantly associated with lower rates of both sexual activity and pregnancy).

Athletic participation is also associated with heightened mental health benefits. Female high school athletes show a markedly lower incidence of considering or planning a suicide attempt, and women and girls who participate in regular exercise suffer lower rates of depression. *See* Don Sabo et al., *High School Athletic Participation and Adolescent Suicide: A Nationwide Study*, International Review for the Sociology of Sport (forthcoming 2004) (on file with the Women's Sports Foundation); G. Nicoloff, and T.S. Schwenk, *Using Exercise to Ward Off Depression*, 9 Physician Sports Med. 23, 44-58 (1995); R.M. Page & L.A.

Tucker, *Psychosocial Discomfort and Exercise Frequency: An Epidemiological Study of Adolescents*, 29 Adolescence, 113, 183-91 (1994) (suggesting that physically active adolescents tend to feel less lonely, shy, and hopeless as compared to their less physically active peers). Indeed, this research suggests that the failure to provide girls with athletic and fitness opportunities endangers the public health. *See Her Life Depends On It*, *supra*, at 5.

In short, research demonstrates that physical activity and sports participation provide potential long-term economic benefits and offer fundamental solutions for many of the serious health and social problems facing America's girls. *Amici's* greatest concern is preserving and advancing these benefits for girls and young women.

II. Title IX Has Only Partially Achieved Its Broad Congressional Purpose.

The provision of equal educational opportunities is the key Congressional purpose of Title IX and the Civil Rights Restoration Act. Congressional drafters of Title IX believed its provisions were necessary to achieve their "obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979) (quoting 122 Cong. Rec. 31,472 (1976) (remarks of Sen. Kennedy)). After passing Title IX, the current implementing regulations were subject to an extensive administrative comment period during which approximately 10,000 comments were received. This process made clear the important role Title IX had come to play with regard to sports. As testified to by Casper Weinberger, then-Secretary of the Department of Health, Education and Welfare:

> [with] regard to athletics, I have to say, Mr. Chairman and members of the committee, I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them.

Sex Discrimination Regulations, Hearings Before the Subcomm. on Postsecondary Education of the Comm. on Education and Labor, 94th Cong., 1st Sess. at 439 (1975).

This Court has said that a key purpose of Title IX is to provide individuals with "effective protection against" discrimination based on gender, and has consistently construed the statute's provisions broadly. *Cannon*, 441 U.S. at 704; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (recognizing a student's private right of action in a peer sexual harassment case even though Title IX contains no express language prohibiting "sexual harassment" nor any regulation pertaining to sexual harassment). This Court's precedents have consistently supported a broad interpretation of Title IX's protections. *See* 34 C.F.R. § 106; *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (upholding the constitutionality of the Title IX regulations governing employment).

Title IX is on its way toward accomplishing its mission of ending discrimination in athletics. It has provided the legal impetus for millions of girls and women to obtain the benefits of participating in competitive athletics. While fewer than 32,000 women participated in college sports prior to the enactment of Title IX, today that number has expanded nearly five-fold to approximately 163,000 women. *See* Dep't of Health, Educ., & Welfare, *Title IX of the Education Amendments of 1972: A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,419 (1979) ("Policy Interpretations"); U.S. General Accounting Office, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, No. 01-297 at 7 (March 2001).

Opportunities for girls at the high school level have increased even more dramatically. Since 1972, female participation in high school athletics has grown by over 971%, from 294,000 to almost 2.9 million. *See* Nat'l Fed'n of State High School Associations, *2003 High School Athletics Participation Survey* (2003). Before Title IX, athletic scholarships for women were almost non-existent, whereas today young women have the opportunity to earn one of 15,000 athletic scholarships awarded per year. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study Twenty Seven Year Update: 1977-2004*, *available at* http://webpages.charter.net/womeninsport. Because of Title IX, girls and young women are able to take advantage of superior coaching, facilities, equipment, medical treatment, travel, and publicity as compared with their athletic foremothers.

Nevertheless, boys' and girls' sports experiences remain far from equal. In 2003, the Secretary of Education's Commission on Opportunity in Athletics reported that it:

> heard troubling testimony that some women and girls are still subject to discrimination, both in access to athletic participation opportunities and in gaining equal treatment in facilities and support services. In some cases, there are discrepancies in the share of scholarships and budgets that cause women to lag behind men in both participation and equal treatment.

U.S. Dep't of Educ., *"Open to All" Title IX At Thirty* at 22 (2003), *available at* http://www.ed.gov/about/bdscomm/list/athletics/report.html. As the Department of Education highlighted in its 1997 report, "we still need to recognize some dismaying facts in our efforts to achieve equity." U.S. Dep't of Educ., *Title IX 25 Years of Progress* (1997),

available at http://www.ed.gov/pubs/TitleIX/part6.html. In relation to athletics, the report noted that boys' varsity teams greatly outnumber girls' varsity teams at the high school level, women receive only one-third of athletic scholarships, and operating expenses for women's college sports represent less than one-quarter of total operating expenses for college sports. *See id.*

Indeed, despite clear guidance from various federal courts as to a school's obligations for compliance,[4] clear directives from the OCR,[5] and facts that are often undisputed,[6] the need continues to file Title IX actions in

4. *See Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000) (affirming and applying Title IX regulations, including requirements for equal participation and equal treatment for female athletes); *accord Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274-75 (6th Cir. 1994), *cert. denied*, 531 U.S. 824 (2000); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (*Cohen I*), and 101 F.3d 155, 170 (1st Cir. 1996) (*Cohen II*), *cert. denied*, 520 U.S. 1186 (1997); *Roberts v. Colo. State Bd. of Agriculture*, 998 F.2d 824, 828 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

5. *See Policy Interpretation*, *supra* (describing the three major areas of regulatory compliance as: "Athletic Financial Assistance (Scholarships)," "Equivalence in Other Athletic Benefits and Opportunities," and "Effective Accommodation of Student Interests and Abilities"). The Title IX regulations were originally published at 45 C.F.R. § 86, and are now located at 34 C.F.R. § 106 (2004). For an examination of the general athletics regulation, *see* 34 C.F.R. § 106.41, and for review of the athletic scholarships regulation, *see* 34 C.F.R. § 106.37(c). *See also* Valerie Bonnette & Daniel Lamar, *Title IX Athletics Investigator's Manual* 7 (1990).

6. Title IX athletics claims are unique because parties often can agree to many of the underlying facts. For example, student-athletes and schools can stipulate as to the number and size of male and female

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federal courts in order to gain the protections afforded by the statute. Recent federal cases support the fact that girls and women still need protection against discrimination based on gender as well as outmoded stereotypes regarding their athletic interest and abilities. *See generally*, *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004) (plaintiffs challenging the Department of Education's implementation of Title IX relied on improper stereotype that women are less interested in sports); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 02-1127, 2004 WL1660268, at *3 (6th Cir. July 27, 2004); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. June 4, 2004) (finding that school's scheduling decisions regarding soccer seasons improperly deprived girls, but not boys, of opportunity to compete in regional and state championships); *Daniels v. Sch. Bd. of Brevard County, Fla.*, 995 F. Supp. 1394 (M.D. Fla. 1997) (finding that the boy's baseball team had an electronic scoreboard, bathroom facilities, a concession stand, a press box, lighting for nighttime play, new bleachers, and large signs publicizing the team, while the girls' softball team had none of these, and noting, "[the school] sends a clear message to players, fellow students, teachers and the community at large, that girls' varsity softball is not as worthy as boys' varsity baseball."); *Landow v. Sch. Bd. of Brevard County*, 132 F. Supp. 2d 958 (M.D. Fla. 2000) (showcasing the inferior manner in which female student-athletes were treated compared to male student-athletes).

Regrettably, despite the fact that thirty-two years have passed since the enactment of Title IX, the "glass sneaker"

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teams, the size of approved budgets for the men's and women's programs, and certain aspects of athletic facilities, such as whether the facility has water, electricity, storage units, restrooms, broadcasting equipment, type and quantity of spectator seating, concession areas, etc.

continues to exist for female participants in interscholastic and intercollegiate athletics. *See* Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 Fordham Intell. Prop. Media & Ent. L.J. 551, 553 (2003) ("The term 'glass sneaker' reflects that, while impressive strides have been made for female students since Title IX's inception thirty years ago, females are still imbued with the attitude that athletic employment, participation opportunities, and benefits are a gift and not an entitlement."). Congressional intent underlying Title IX will certainly be frustrated if educational institutions receiving federal funds remain free to retaliate against individuals who complain about gender discrimination. Equally troubling is the fact that the benefits the sports experience provides to women and girls, and the remarkable strides taken since the passage of Title IX, will be lost.

III. A Retaliation Claim is a Necessary Mechanism for Fully Achieving Title IX's Statutory Intent

A. Coaches Are Direct Victims of Discrimination.

The strength of our civil rights laws, including Title IX, hinges on the willingness of persons to come forward with information about discrimination, just as Coach Jackson did. This Court has held that "there can be no question" that one who is not a minority but who is "punished for trying to vindicate the rights of minorities" has standing to raise a discrimination claim on his own behalf. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *see also Peters v. Jenney*, 327 F.3d 307, 318 n.10 (4th Cir. 2003) (noting that the Eleventh Circuit's decision in *Jackson* "did not consider the impact of *Sullivan* and its progeny"). Coaches, in particular, are uniquely well-positioned both to observe discriminatory conduct from their vantage point on the front

line, as well as to advocate on behalf of their student-athletes against these discriminatory conditions. Moreover, drawing a distinction, as the court did below, between some class of "direct" and "indirect" victims of gender discrimination in education is not only virtually impossible, but likely to frustrate Title IX's goal of eliminating all forms of gender discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1346 (11th Cir. 2002) (stating that "even if Title IX did aim to prevent and remedy retaliation for complaining about gender discrimination, [coaches are] plainly . . . not within the class meant to be protected by Title IX.").

Despite the Eleventh Circuit's conclusion to the contrary, coaches fall squarely within the class of persons intended to be protected by Title IX. This Court has already recognized that Title IX's employment protections extend to teachers and coaches. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-31 (1982) (examining legislative history and determining that eliminating discriminatory employment practices in educational settings is at the "heart" of Title IX); *see also* 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh) ("The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment. . . ."). Indeed, Title IX was enacted in large part to close the loopholes in existing legislation, and to extend equal employment opportunities to educational institutions. 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh). As educators as well as employees, teachers and coaches suffer from the precise gender discrimination Title IX is designed to eradicate.

It would be imprudent (and indeed, impossible) to draw lines between coaches and their teams, labeling one a direct and one an indirect victim of gender discrimination. Coaches themselves suffer direct discrimination when resources such

as equipment and practice time are denied on the basis of sex. In the increasingly competitive environment in which many qualified applicants compete for each coveted coaching spot, a losing record can be a career killer. Few criteria are more important to a coach's career than the win-loss record achieved at his or her last position. If resources crucial to a team's success are granted to the boys' team but denied to the girls' team, the damage to the career of the girls' coach clearly occurs "on the basis of sex" – in direct violation of Title IX. *See, e.g., Coble v. Hot Springs Sch. Dist. No.* 6, 682 F.2d 721, 734 (8th Cir. 1982) (recognizing that it could constitute employment discrimination to grant career assignments and benefits to the coaches of boys' teams while denying them to coaches of girls' teams).

Additionally, gender bias has been shown to be detrimental to boys as well as girls. Discrimination in a school setting makes it difficult to separate direct and indirect victims generally. For example, studies have shown that boys feel "boxed in" – their opportunities limited by the same cultural expectations and stereotypes that jeopardize girls. *See, e.g.*, Myra Sadker & David Sadker, *Failing at Fairness* 197-225 (1994); Craig P. Flood & Susan Shaffer, *Safe Boys, Safe Schools*, WEEA Digest, Nov. 2000, 3-5, *available at* http://www.edc.org/WomensEquity/pdffiles/males.pdf.pdf. While girls may decide not to take a challenging math class, boys often overvalue their own abilities, selecting classes or activities that are beyond them. *See* Michael Kimmel, *What About the Boys?*, WEAA Digest, Nov. 2000, at 2, *available at* http://www.edc.org/WomensEquity/pdffiles/males.pdf.pdf.

It is unwise, unjust, and contrary to the mandate of Title IX to claim that only certain victims of discrimination can call attention to violations. Schools influence the intellectual and moral development of children, and any discrimination that occurs within their walls is especially insidious and

destructive. Unfair treatment "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The goal of Title IX is not to ensure that there are only indirect victims of discrimination, but to ensure that, within our school walls, no one is a victim of discrimination at all.

In summary, coaches are direct victims of discrimination when they face damage to their careers – either from receiving unequal treatment based on the gender of the athletic teams they coach or from discriminatory retaliation for protesting such conditions. But unlike other forms of discrimination, gender bias in schools does not clearly divide individuals into a class of discriminators and a class of victims. Unfair treatment in athletics and in schools infects our children's consciousnesses, negatively and permanently altering their perceptions of the world and their notions of equality and justice.

B. Student-Athletes Are Not the Most Efficient Enforcers of the Law.

Institutional and social disincentives create barriers to girls' ability to remedy gender discrimination in athletics. If the enforcement of the law rests solely in the hands of students, many of whom are only children, violations will go largely ignored.

Amici have extensive experience with students hoping to remedy inequities at their schools. These students face a wide array of social costs that prevent them from even raising the issue of equitable resources for boys and girls. In many towns, male sports are the centerpiece of town pride and attention. Female athletes who attempt to secure a more equitable distribution of resources between boys' and girls'

teams are often socially ostracized, viewed as pilfering resources from the revered boys' programs. These students, who are often viewed as "boat rockers," also risk losing their schools' support in securing athletic or academic scholarships and recommendations. Merely protecting students from Title IX retaliation cannot remove this disincentive.

Institutionally, students also face bureaucratic hurdles, as it can take several years before an alleged violation is rectified, a delay that stretches well beyond a student's graduation date. *See Cook v. Colgate Univ.* 992 F.2d 17, 20 (2d Cir 1993) (dismissing Title IX case as moot because plaintiffs would graduate before complaint could be remedied). Additionally, student-athletes, unlike school employees, generally are not informed about the provisions of Title IX, nor are they aware of the enforcement mechanisms the law provides. In a recent study, less than 5 percent of students had even heard of Title IX. *See* Karen Zittleman, Title IX and Gender Issues: A Study of the Knowledge and Perceptions of Middle School Teachers and Students (2004) (unpublished doctoral dissertation, American Univ.) (on file with Myra Sadker Advocates).[7] Even if a school *has* assigned such a coordinator,[8] students cannot

7. According to Zittleman's dissertation, out of 540 middle schoolers surveyed in Maryland, Virginia, the District of Columbia, and Wisconsin, only eight students could offer a description of Title IX. These responses are characterized by a minimal understanding of the law as related to athletics or a general notion of gender equity and as only offering protections to females. Moreover, no student could identify their school Title IX coordinator or the U.S. Dept of Education/OCR as the respective local and national contacts for help.

8. *Title IX Responsibilities: Dear Colleague*, Office for Civil Rights, U.S. Dep't of Educ., Apr. 26, 2004, *available at* http://www.ed.gov/about/offices/list/ocr/responsibilities_ix.html (noting several instances where schools have not complied with the requirements of Title IX, including the failure to designate and/or train an employee to serve as the Title IX coordinator).

identify who that person is. *See* Conn. Women's Educ. & Legal Fund, *Keeping Score: A Report Regarding Connecticut Secondary Schools and Title IX's Mandate for Gender Equity in America* (1997) (indicating that only 8% of student-athletes surveyed could identify their Title IX coordinator). To achieve Congressional purpose and correct Title IX violations, enforcement of the law cannot be placed solely in the hands of those least likely to have the means or the incentives to enforce it - female students.

C. Administrative Procedures Are Less Efficient Mechanisms for Enforcing Title IX.

Amici also have extensive experience working with aggrieved female athletes and their families who have attempted to resolve their schools' athletic inequities through the Office of Civil Rights. *See* Women's Sports Foundation, *Report on Title IX, Athletics and the Office for Civil Rights: An Examination of Letters of Findings Issued by the Office for Civil Rights in the Post-Restoration Act Era* (1997). This experience suggests that the administrative enforcement of Title IX through the OCR is insufficient. Inadequate resources leave the OCR unable to address all Title IX violations, including complaints of retaliation. In 2001, the OCR initiated just two Title IX athletics reviews of institutions. *See* Nat'l Coalition for Women and Girls in Educ., *Title IX at 30: Report Card on Gender Equity* 20 (June 2002), *available at* http://www.ncwge.org/title9at30.pdf.

Furthermore, individuals who file complaints with the OCR have neither the right to participate in the investigation and enforcement of their complaints nor the right to make sure their evidence or witnesses are heard. The agency is not even required to provide relief to the individual complainant as part of the compliance agreements it obtains. Indeed, the agency can opt not to investigate a particular complaint at

all. Clearly, none of the basic elements of due process that characterize judicial proceedings are present. Court cases confirm that OCR's review process and findings often miss ample evidence of discrimination. *See, e.g., Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828-29 (10th Cir.) (rejecting OCR's conclusion that Colorado State was in compliance with Title IX); *see also The Glass Sneaker*, *supra*, at 602. Remarkably, but tellingly, the OCR's only explicit disciplinary power – withholding federal funds, *see* 20 U.S.C. § 1682 – has never been exercised in the 32 years of Title IX's existence.

More than two decades ago, this Court rejected the contention that Congress intended administrative enforcement to be the sole means of enforcing Title IX, recognizing that the right to sue in court is still critical to provide full protection from discrimination. *See Cannon*, 441 U.S. at 702-09. That right remains critical. Retaliation is a form of discrimination and must be encompassed in the existing right of action.

D. Coaches Are More Efficient Enforcers of the Law.

Practically, coaches have institutional advantages in terms of knowing how and with whom to effectively address discrimination. Coaches have access to information that students do not; namely about resource allocation between and among athletic teams. Coaches are in a natural position to know the intricacies of their teams, including the number of students on the team; the equipment, supplies and facilities provided; scheduling of games and practices; opportunity to receive coaching and academic tutoring; provision of medical services; training facilities and services; housing and dining facilities and services; publicity; and recruiting and support services. *See* 34 C.F.R. § 106.41(c) (citing the above considerations as factors to be utilized in determining whether equal athletic opportunities are available for members of both sexes).

Additionally, coaches generally have collegial relationships with their fellow coaches and administrators, providing avenues to informally remedy complaints, as well as access to important information and policy decisions. This access positions teachers and coaches particularly well to serve as advocates for their students, and to be able to identify the discriminatory situations that should not be part of a student's educational experience. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563, 572 (1968) ("Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."). In fact, it is this status that makes a coach "the only effective adversary" against the discriminatory act. *Sullivan*, 396 U.S. at 237 (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)).

Nonetheless, *amici* members know that it is difficult and dangerous for coaches to call attention to discrimination when they risk potentially unfettered adverse employment actions. The reality is that many coaches are on one-year, terminable at-will contracts, have no expectation of tenure, and are not members of unions that might otherwise provide support. In the more lucrative positions in the 114 Division I-A NCAA institutions, where negative rumors can permanently extinguish a coach's career opportunities, the stakes are particularly high. For example, one former women's basketball coach who alleged she experienced employment inequities as compared to the men's basketball coach contended that the assistant athletic director at her university informed her that if she "filed a formal complaint about the matter either within or outside the University, she would be terminated from her employment and 'would never work in the Northeast again.'" *Legoff v. Trs. of Boston Univ.*, 23 F. Supp. 2d 120, 124 (D. Mass. 1998). Providing "whistle

blower" protection to those who are both the most knowledgeable and most likely spokespersons regarding violations of Title IX is a necessary means to advance gender equity in athletics.

CONCLUSION

The strength of our civil rights laws hinges on the willingness of citizens to expose violations. The history and purpose of Title IX supports a private cause of action for retaliation in order to remedy and prevent gender discrimination in education. Because sports participation provides significant physical, economic, and professional opportunities in contemporary American society, and because administrative enforcement efforts alone have proven incapable of effectively protecting individuals from prohibited discrimination in federally funded programs, a private right of action for retaliation under Title IX is necessary. This case is ultimately about effectuating Congress' intent that girls and women be treated equitably by educational institutions. Finding that individuals may not seek full recourse when they are punished by federal fund recipients for protesting sex discrimination would dramatically undermine the purposes of Title IX.

Respectfully submitted,

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